Supreme Court, U. S.
FILED
AUG 28 1980
MICHAEL RODAK, JR., CLERK

No. 80-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR ANDERSEN & CO.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

FREDERIC W. HICKMAN
MICHAEL M. CONWAY
WM. CARLISLE HERBERT
Hopkins, Sutter, Mulroy,
Davis & Cromartie
One First National Plaza
Suite 5200
Chicago, Illinois 60603
(312) 558-6600

Attorneys for Petitioner

J. READ MURPHY
Murtha, Cullina, Richter,
and Pinney
101 Pearl Street
Hartford, Connecticut 06103

DONALD DREYFUS
Arthur Andersen & Co.
69 W. Washington Street
Chicago, Illinois 60602

Of Counsel

QUESTIONS PRESENTED

1. Whether, in order to obtain appellate review of a district court order enforcing an IRS summons for production of sensitive accounting workpapers, Arthur Andersen & Co. must flaunt the court's order and stand in contempt of court. Andersen complied with a final district court order to produce its "tax accrual workpapers" and, as a result, its appeal of the order was dismissed as moot. A case is not moot if it involves an issue which is "capable of repetition yet evading review." The Court of Appeals held that this case does not fall in the "evading review" category because Andersen could have obtained review by defying the district court order and appealing the resulting contempt citation.

2. Whether the Internal Revenue Service must make a particularized showing of relevance to obtain the tax accrual workpapers prepared by a public accounting firm engaged to examine and report on a corporation's financial statements. Tax accrual workpapers are "opinion" documents, reflecting the accountant's subjective assessment of its client's potential tax exposures and prepared in order to test the reasonableness of the client's estimates, appearing in its financial statements, of its unpaid tax liabilities.

PARTIES

Parties in the Court of Appeals were

The United States of America and Francis W. Murphy, Special Agent, Internal Revenue Service, Petitioners-Appellees;

Arthur Andersen & Co. ("Andersen"), Respondent-Appellant;

Good Hope Industries, Inc. ("Good Hope"), Intervenor-Appellee (the taxpayer under investigation and the client of Andersen).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. AS TO MOOTNESS	7
Andersen's Appeal Should Not Have Been Dismissed as Moot	7
The Court Below Denied Decision of an Important Public Issue In a Case Where None of the Reasons for the Mootness Prohibition Is Present...	7
The Decision Below Conflicts With Principles of Judicial Administration Enunciated by this Court.	9
The Decision Below Conflicts With the Specific Holding of the Seventh Circuit that a Litigant Need Not Stand in Contempt	13
The Decision of the Court Below Is Plainly Wrong and Will Unsettle a Hitherto Settled Rule of Judicial Administration	14
The "Familiar Procedure" Argument Is Wrong	14
The Attempt to Distinguish the Seventh Circuit Opinion Lacks Substance	16
As a Means of Ensuring Concrete Adversity, Contempt Is a Very Undesirable Procedure Where Alternative Procedures Are Available	17
Failure to Clarify the Conflict Between Circuits Will Produce Injustice	18
The Opinion Below Renders Illusory This Court's Promise of Appellate Review for Summons Enforcement	19
Summary	19

Page

II. AS TO THE SUBSTANTIVE ISSUE: DISCLOSURE OF TAX ACCRUAL PAPERS 20

The Ability of the Accounting Profession to Function Effectively In the Public Interest Is At Stake ... 20

The Court Below Confirms the Importance of the Issue 22

This Appeal (Unlike Good Hope's Appeal) Is an Ideal Matrix for a Precedent 22

Andersen Seeks a Construction of "Relevance" That Would Protect the Interests of the IRS, the Taxpayer and the Public 24

The Issues In This Case Are Closely Related to Those in the *Upjohn* Case, for Which This Court Has Just Granted Certiorari 26

The Decision of the First Circuit Creates a Conflict Between Circuits 27

CONCLUSION 29

APPENDIX A: Court of Appeals Opinion in Dkt. 79-1411 ..... A-1

APPENDIX B: District Court Opinion A-10

APPENDIX C: Court of Appeals Opinion in Dkt. 79-1405 ..... A-29

APPENDIX D: Judgment of Court of Appeals in Dkt. 79-1411 ..... A-38

APPENDIX E: Mr. Justice Brennan's Order Extending Time for Filing Petition for Writ of Certiorari A-39

APPENDIX F: Statutes 26 U.S.C. § 7602 and 7604 ..... A-40

APPENDIX G: Denial of Stay in District Court and Court of Appeals A-42

APPENDIX H: Mr. Justice Brennan's Denial of Stay on August 20, 1979 ..... A-46

APPENDIX I: Internal Revenue Service Manual A-47

TABLE OF AUTHORITIES

	Page
Application of United States, 610 F.2d 1148 (3d Cir. 1979)	10
Application of United States, 616 F.2d 1122 (9th Cir. 1980)	11
Arthur Andersen & Co., United States v., 474 F. Supp. 322 (D. Mass. 1979) *dismissed as moot,* 45 AFTR 2d 80-1590 (1st Cir. 1980)	1-2
Arthur Andersen & Co., United States v., 474 F. Supp. 322 (D. Mass. 1979) *aff'd.,* 46 AFTR 2d 80-5285 (1st Cir. 1980)	1-2, 22, 26
Baldridge v. *United States,* 406 F.2d 526 (5th Cir. 1969)	11
Barney v. *United States,* 568 F.2d 116 (8th Cir. 1978)	11
Cobbledick v. *United States,* 309 U.S. 323 (1940)	15
Coopers & Lybrand, United States v., 550 F.2d 615 (10th Cir. 1977), *aff'g.* 413 F. Supp. 942 (D. Colo. 1975)	4-5, 28
Deak-Perera, United States v., ____ F.2d ____ No. 79-6035 (2d Cir., Oct. 26, 1979)	11
Doe v. *Bolton,* 410 U.S. 179 (1973)	12
Harvey v. *Rosenthal & Co.,* ____ F.2d ____, No. 79-1803 (7th Cir., July 14, 1980)	13
Hickman v. *Taylor,* 329 U.S. 495 (1947)	26
In re Special April 1977 Grand Jury, 581 F.2d 589 (7th Cir. 1978), *cert. denied sub nom. Scott* v. *United States,* 439 U.S. 1046 (1979)	6, 13-16
Kurshan v. *Riley,* 484 F.2d 952 (4th Cir. 1973)	11

Page

Lyons, United States v., 442 F.2d 1144 (1st Cir. 1971) 11

Nebraska Press Assn. v. *Stuart,* 427 U.S. 539, 546-47 (1976) 12

New York Telephone Co., United States v., 434 U.S. 159, 165 n.6 (1977) 10, 13

Powell, United States v., 379 U.S. 48 (1964) 26

Reisman v. *Caplin,* 375 U.S. 440, 449-50 (1964) 15, 19

Roe v. *Wade,* 410 U.S. 113, 124-25 (1973) 12

Ryan, United States v., 402 U.S. 530 (1971) 15

Sibron v. *New York,* 392 U.S. 40, 57 (1968) 9

Southern Pacific Terminal Co. v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911) 5, 9-10

United Mine Workers, United States v., 330 U.S. 258, 303 (1947) 17

United States Parole Commission v. *Geraghty,* No. 78-572, 48 U.S.L.W. 4296, 4298-99 (March 19, 1980) 12

Upjohn Co. v. *United States,* No. 79-886, 48 U.S.L.W. 3481, 3602 (1980) 26-28

STATUTES

26 U.S.C. § 7602 ..... 2, 4, 28

26 U.S.C. § 7604 ..... 2, 4

28 U.S.C. § 1254(1) 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR ANDERSEN & CO.,

Petitioner,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

OPINIONS BELOW

This case is a proceeding to enforce an IRS summons against Andersen and was heard in the United States District Court for the District of Massachusetts. The summons called for accounting papers prepared and owned by Andersen but relating to the business of Good Hope. Good Hope intervened in the proceeding. The opinion of the district court (Appendix B, *infra* at A-10) is reported at 474 F. Supp. 322, and unofficially at 79-2 U.S.T.C. 9506 and 44 AFTR 2d 79-5401.

Andersen and Good Hope filed separate notices of appeal to the Court of Appeals for the First Circuit, which were assigned separate docket numbers by that court. Both appeals

involved the same court order and raised, in substantial part, identical issues. However, because of a delay by Good Hope in processing its appeal, the two dockets were not consolidated but were considered separately by the Court of Appeals.

The court's opinion in Dkt. No. 79-1411 (Andersen's appeal) is attached as Appendix A, *infra* at A-1, and is unofficially reported at 45 AFTR 2d 80-1590. The court's opinion in Dkt. 79-1405 (Good Hope's appeal) is attached as Appendix C, *infra* at A-29, and is unofficially reported at 46 AFTR 2d 80-5285.

The second opinion (Good Hope's appeal) decided only issues and arguments not decided in the first opinion (Andersen's appeal). While only issues involved in the first opinion are presented in this petition, the case was decided by the two opinions in combination.

JURISDICTION

The judgment of the Court of Appeals in Dkt. 79-1411 was entered on March 31, 1980 and in Dkt. 79-1405 on June 16, 1980. By order dated June 16, 1980 (Appendix E, *infra* at A-39), Mr. Justice Brennan extended the time for filing this petition with respect to Dkt. 79-1411 to and including August 28, 1980. (No. A-1102) The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Sections 7602 and 7604 of the Internal Revenue Code, 26 U.S.C. 7602 and 7604, are the applicable statutes and are set forth in Appendix F, *infra* at A-40. The key provision is:

> Section 7602. Examination of books and witnesses.
>
> For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . . , or collecting any such liability, the Secretary is authorized
>
> (1) To examine any book, papers, records or other data which may be relevant or material to such inquiry; . . .

STATEMENT OF THE CASE

On November 14, 1977, the Internal Revenue Service issued a summons directing Andersen to produce and to testify about various records and workpapers related to its auditing and tax planning work for Good Hope.

Andersen resisted the production of certain documents. The district court ordered the production of all of Andersen's workpapers. Andersen appealed from the order only with respect to the production of "tax accrual workpapers."

Tax accrual workpapers are prepared in connection with the independent accounting firm's auditing function (as distinguished from its tax advisory and tax return preparation function, which the firm may or may not perform for the client). The financial statements of a company reflect an income tax expense and a related accrued liability. The income statement reflects the tax liability accrued during the period covered by the statement, and the balance sheet reflects the total accrued liability (both known and estimated) which remains unpaid as of the balance sheet date. These numbers are to a significant degree estimates, and no one number is "correct."

In auditing the financial statements of a client, the independent accounting firm must form a judgment as to whether the accrued tax liabilities are shown in amounts which are reasonable, in order to express its opinion as to whether the company's financial statements fairly present the company's financial position. Many positions taken by a taxpayer are not clear-cut under the law. The accountant must evaluate each uncertain tax position in order to determine whether the company has established, in the aggregate, a reasonable accrual to cover the possible tax liability.

The tax accrual workpapers are the workpapers prepared by the accounting firm in arriving at this judgment. These

workpapers ordinarily are of two different types. The first type are mechanical in nature, and represent analyses of factual material drawn from the books and records of the company, organized in a manner that is convenient for the accountant. Generally speaking, these are arithmetical analyses which Andersen would make available for examination by the Internal Revenue Service. In addition, such information is frequently supplemented by the accountant upon request, to assist its client in furnishing relevant information to the IRS.

The second type are workpapers assembled to allow the accountant to form the subjective judgment mentioned previously. Such workpapers do not typically include factual information from the client's books and records. This subjective information identifies potential issues of adjustment, analyzes the applicability of the tax law to the issues, evaluates the uncertainties involved and estimates the accrued federal income tax reserves appropriate to protect the company. This analysis is necessary so that, in the event such uncertainties materialize, adjustments to the company's federal income tax liabilities will not arise in amounts which would impair its financial position. It is these subjective workpapers, involving opinion and judgmental matters, that Andersen seeks to protect.

The IRS sought enforcement of the summons in the district court pursuant to Section 7604 of the Internal Revenue Code, 26 U.S.C. 7604. Andersen asserted in the district court that its tax accrual workpapers were not "relevant" to the IRS' investigation of Good Hope's tax liabilities within the meaning of Section 7602.

Andersen relied on *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977), *aff'g.* 413 F. Supp. 942 (D. Colo. 1975), the only prior case which had squarely addressed the status of tax accrual workpapers. In *Coopers & Lybrand* the Tenth Circuit held that tax accrual workpapers were not

ordinarily "relevant" to an IRS investigation of the client's tax liabilities within the meaning of Section 7602.

The district court below rejected *Coopers & Lybrand.* 474 F. Supp. at 329. It declined to require the IRS to show that the tax accrual workpapers were or were likely to be relevant to its investigation. Although the IRS Special Agent who had issued the summons admitted that he did not even know what tax accrual workpapers were, the district court found that the "collective familiarity" of the agents involved in the investigation was sufficient to establish the requisite "expectation" of relevance. *Id.* at 329-30. The district court ordered Andersen to comply with all aspects of the summons.

Andersen and the intervenor, Good Hope, moved for a stay pending appeal in the district court and in the Court of Appeals, but each court denied the motion (Appendix G, *infra* at A-42). Good Hope went further and asked this Court for a stay (No. A-158), but that, too, was denied by Mr. Justice Brennan on August 20, 1979. (Appendix H, *infra* at A-46).

When the stays were denied, Andersen was faced with the alternative of complying with the order of the district court and producing the documents or defying the order and standing in contempt. It elected to obey the law. The documents were produced.

The United States thereafter moved to dismiss the appeal as moot. Andersen asserted in the Court of Appeals that its appeal was not moot, because the issue involved is "capable of repetition, yet evading review," a doctrine enunciated by this Court in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911).

The Court of Appeals acknowledged that the issue was capable of repetition, as there was a reasonable expectation that Andersen would be subject to the same action again by the IRS.

Op at A-4. The court also found that Andersen could not expect to obtain appellate review of the question prior to enforcement of the IRS summons, in light of the strong policy opposing delays in enforcement of such summonses. Op. at A-5. The court nevertheless concluded that the question was not one that "evaded review," because Andersen could have defied the district court's order for enforcement and raised its argument in the context of a contempt proceeding. Op. at A-5. The court therefore dismissed the appeal as moot.

In reaching its decision, the First Circuit expressly refused to follow the holding of the Seventh Circuit in *In re Special April 1977 Grand Jury,* 581 F.2d 589 (7th Cir. 1978), *cert. denied sub. nom. Scott* v. *United States,* 439 U.S. 1046 (1979). In that case, the Seventh Circuit permitted appeal from an order enforcing a grand jury subpoena directed to members of the Illinois Attorney General's staff, notwithstanding that the staff had complied with the order prior to appeal. The court found that the subpoena was not moot because it was part of a continuing investigation and future subpoenas subject to the same objections were likely. It noted that in applying the "capable of repetition, yet evading review" doctrine:

> the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions. . . . *Id.* at 591.

The First Circuit sought to distinguish *In re Special April 1977 Grand Jury* on the ground that the staff-members of the Illinois Attorney General did not have as much incentive as Andersen to commit contempt of court. Op. at A-6. The First Circuit also reasoned that committing contempt to obtain appellate review was a "familiar procedure" and that it did not seem "too draconian" to require Andersen to resort to contempt to preserve its objection for appeal. Op. at A-8.

REASONS FOR GRANTING THE WRIT

I. AS TO MOOTNESS

Andersen's Appeal Should Not Have Been Dismissed as Moot

The Court should grant the writ to review the question of mootness because the rule announced below rejects established precedent in this Court and in another circuit; and in doing so it advances no good purpose or policy, but on the contrary, contributes to disregard for law and the judicial process, subverts the effective investigative procedures of the IRS and imposes unjustifiable burdens on litigants.

The particular ground on which the court rests its conclusion was not developed in the briefs or at oral argument. Petitioner respectfully submits that the court has failed to appreciate the full implications of the rule it announces and the pernicious effect it would have on the judicial process, on the process of administrative investigations and on the resolution of important public issues.

The Court Below Denied Decision of an Important Public Issue In A Case Where None of the Reasons for the Mootness Prohibition Is Present

The original notion behind the prohibition against deciding moot cases was simple: that it is useless for courts to decide a case if there is no longer a subject matter on which the court's decision can operate. Subsequently the courts developed these additional reasons:

1. Cases in which the original controversy has been settled may be left in a posture which is abstract or hypothetical. That is antithetical to the common law process, which rests on "concrete adversity," *i.e.*, on the proposition that decisions on

concrete facts with active adversaries will, in cumulation, best delineate the contours of more general rules.

2. In cases in which the original controversy has been settled, one or both parties are likely to lose interest and commitment, with the result that the facts and arguments will not be fully developed or carefully presented.

3. In deciding cases in which the original controversy has been settled, courts may intrude on policy making by other branches of government. If the courts' role is to decide matters in which there is "concrete adversity," the corollary is that courts intrude on the role of the legislative and executive branches if they depart from cases with "concrete adversity" and promulgate general laws and administrative policies.

4. A case which is truly moot is not a "case or controversy" in the constitutional sense and, therefore, may not be decided by the federal courts.

None of these reasons is present in this case. The substantive issue here could not be more specific or concrete. It focuses on a specific set of documents and there is a full development of facts in the record and a full development of the arguments in the briefs. No future case is likely to be more concrete or specific.

The issue in controversy is extremely important to a large affected class and remains live in every practical sense. The decision confronts not only Andersen but all accounting firms with continuing harm. Its mere existence diminishes the willingness of Andersen's clients to communicate freely and thus renders the professional auditing function more difficult to perform, more costly and less effective. The Internal Revenue Service has already revised its operating Manual to cite the *Andersen* opinion as supporting its view and to encourage its examining officers to intrude further into the area at issue.

(Appendix I, *infra* at A-47) The American Institute of Certified Public Accountants (AICPA) regards the case with great concern and filed amicus briefs in the court below. It intends to do so again, we are advised, in connection with this petition. The issue is prominent in the pages of accounting and legal journals and at the meetings of the AICPA and the American Bar Association.

The words of the Court in *Sibron* v. *New York,* 392 U.S. 40, 57 (1968), fit this case exactly:

> None of the concededly imperative policies behind the constitutional rule against entertaining moot controversies would be served by a dismissal in this case. There is nothing abstract, feigned, or hypothetical about Sibron's appeal. Nor is there any suggestion that either Sibron or the State has been wanting in diligence or fervor in the litigation. We have before us a fully developed record of testimony about contested historical facts, which reflects the "impact of actuality" to a far greater degree than many controversies accepted for adjudication as a matter of course under the Federal Declaratory Judgment Act, 28 U.S.C. §2201.

The Decision Below Conflicts With Principles of Judicial Administration Enunciated by this Court

This Court, beginning in *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515 (1911), has articulated the doctrine that the mootness prohibition does not apply to prevent review in cases "capable of repetition, yet evading review." The court below eviscerates this doctrine by finding it inapplicable if an appellant can obtain review by defying the district court's order and standing in contempt, even though that contempt affronts the court and carries the possibility of severe punishment for the appellant.

Review by an appellate court is usually available in theory to one who is willing to defy the law. But this Court has never required litigants to defy the law and subject themselves to contempt or criminal sanctions to obtain appellate review under the "capable of repetition, yet evading review" doctrine. The

First Circuit's holding is directly in conflict with a number of cases in which this Court and others held issues not to be moot although appellants complied with laws or court orders they could have defied.

In the original *Southern Pacific Terminal* case, it appears that the appellant could have defied the Interstate Commerce Commission and secured review when the Commission sought enforcement or penalties in the courts.

This Court's holding in *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165 n.6 (1977) stands contrary to the decision below on closely analogous facts. In that case, the telephone company challenged an order of the district court compelling the company to make equipment available for a surveillance operation by the FBI. After unsuccessfully moving in the district court and in the court of appeals for a stay pending appeal, the telephone company complied with the order. This Court held that the expiration of the order did not render the case moot, because the controversy was capable of repetition, yet evading review. The Court did not require the telephone company to defy the district court's order and raise its objection in the context of a contempt proceeding.

This holding has been followed without question by both the Court of Appeals for the Third Circuit and the Court of Appeals for the Ninth Circuit in similar cases involving orders for telephone company cooperation with government investigations. In *Application of United States,* 610 F.2d 1148 (3d Cir. 1979), the court of appeals expressly stated:

> These cases might appear to be moot since the telephone companies have fully complied with the orders. No decision of this court could remedy any errors that the district courts might have committed. However, we find that the orders fit within the exception to mootness for "short term orders, capable of repetition, yet evading review." 610 F.2d at 1153.

And in *Application of the United States,* 616 F.2d 1122 (9th Cir. 1980), the court believed this conclusion so obvious that it simply observed in a footnote:

> We do not understand the government to argue, nor could it, that because the surveillance authorized by the district court has been completed, the case is therefore moot. Under the principles set forth in *Southern Pacific Terminal Co.* . . . , the issue presented here is one "capable of repetition, yet evading review." *United States* v. *New York Telephone Co.,* . . . . 616 F.2d at 1128 n. 5.

The fact situations in those cases cannot be distinguished from those in this case. In both, a private party, not itself the subject of a government investigation, has been ordered to provide assistance to the government in making its investigation. The order in question is not part of ongoing litigation between the government and the private party. The private party will not be party in any future litigation involving the materials obtained as a result of the order. Consequently, the private party will have no later opportunity to challenge the order. Yet, because of the nature of the private party's business and the continued need for the kind of investigation involved, the private party will continually be subject to similar orders.[1]

---

[1] As the Court of Appeals below noted in its footnote 6 (Op. at A-4), the fact that the private party is not itself under investigation (and therefore will not participate in any proceedings resulting from the investigation) and will be continually asked to assist in investigations, distinguishes this case from that involving resistance by a taxpayer to a summons. A taxpayer will have an opportunity to challenge the use of the fruits of such orders, and, in any event, cannot reasonably claim that he will be subject to repeated orders in the future. See *United States* v. *Deak-Perera,* ____ F.2d. ____ No. 79-6035 (2d Cir., decided Oct. 26, 1979); *Barney* v. *United States,* 568 F.2d 116 (8th Cir. 1978); *Kurshan* v. *Riley,* 484 F.2d 952 (4th Cir. 1973); *United States* v. *Lyons,* 442 F.2d 1144 (1st Cir. 1971); *Baldridge* v. *United States,* 406 F.2d 526 (5th Cir. 1969).

Similarly, the journalists in *Nebraska Press Assn.* v. *Stuart*, 427 U.S. 539, 546-47 (1976), who challenged a state court order temporarily restraining pretrial publicity, could have violated the order and raised their objection in the context of a contempt proceeding. And the women in *Roe* v. *Wade*, 410 U.S. 113, 124-25 (1973), and *Doe* v. *Bolton*, 410 U.S. 179 (1973), who challenged statutes forbidding abortion, could have violated those statutes and raised their objections in the context of a criminal prosecution.

If the "evading review" category excludes all cases in which review can be obtained by taking unlawful steps, the category does not cover most of the cases in which this Court and other courts have applied the "capable of repetition, yet evading review" doctrine. The doctrine would be reduced to a meaningless thing, as it would cover virtually nothing.

The "capable of repetition, yet evading review" doctrine assumes that the appellant has already complied with the law or order — which is why the controversy has arguably become "moot." The doctrine holds that compliance does not result in mootness if the appellant can expect the issue to recur, with the likelihood that the challenged requirement will again evade review. The concept is that, under these circumstances, the case retains its character as a present, live controversy. The appellant has a continuing personal stake in the requirement, his vigorous advocacy can be expected, and the Article III requirement that a case or controversy exists is met. *United States Parole Commission* v. *Geraghty*, No. 78-572, 48 U.S.L.W. 4296, 4298-99 (March 19, 1980).

It is unnecessary — and an unwise public policy — to force the appellant into civil disobedience.

The Decision Below Conflicts With the Specific Holding of the Seventh Circuit That a Litigant Need Not Stand in Contempt

In *In re Special April 1977 Grand Jury,* the Seventh Circuit specifically rejected the argument that a person who objects to a subpoena enforcement order must stand in contempt of court to obtain appellate review and thereby prevent the issue from evading review on appeal. The Court said:

> . . . the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions to meet this prong of the mootness test. 581 F.2d at 591.

That statement accurately reflects the holding of this Court in *New York Telephone* and other cases discussed above.

The Seventh Circuit repeated its conclusions in an as yet unreported decision in *Harvey* v. *Rosenthal & Co.,* ____ F.2d. ____, No. 79-1803, decided July 14, 1980, involving an appeal from a request for a preliminary injunction challenging the location of a Commodities Future Trading Commission reparations hearing. The court acknowledged the conflict between its position and that of the First Circuit:

> To be sure, this Court has in the past been reluctant to require a party to risk serious judicial sanctions in order to preserve a question that will otherwise become moot. See *In re Special April 1977 Grand Jury,* 581 F.2d 589 (7th Cir. 1978), certiorari denied sub nom. *Scott* v. *United States,* 439 U.S. 1046, but see *United States* v. *Arthur Andersen & Co.,* (1st Cir. No. 79-1411, decided March 31, 1980).

The court refused to equate the risk of default in the reparations hearing with being adjudged in contempt of court and held that, in any event, review would be available in conjunction with review of the substantive hearing.

The Decision of the Court Below is Plainly Wrong and Will Unsettle a Hitherto Settled Rule of Judicial Administration

The decision of the court below rests on a narrow ground. It holds that contempt is a "familiar procedure" for obtaining judicial review and that appellants who fail to resort to that familiar procedure cannot complain of their cases "evading review." It attempts to distinguish on a factual basis the decision of the Seventh Circuit in *In re Special April 1977 Grand Jury.*

The "capable of repetition, yet evading review" doctrine has never before been applied to require appellants to defy the law, no matter how "familiar" the defiance procedure may be. In adding that requirement, the court below unsettles seven decades of practice and will, if it stands, give rise to unfairness and inefficiency in judicial administration and to undesirable changes in the behavior of litigants.

The decision below raises no fundamental issues that would profit from re-examination or debate in the lower courts. The narrow grounds relied on below are simply mistaken and should be promptly reversed by this Court before they create widespread trouble.

The "Familiar Procedure" Argument is Wrong

The court below characterizes contempt as a "familiar procedure" which it is not unreasonable to require. But in the cases applying the "capable of repetition, yet evading review" doctrine contempt is *not* a "familiar procedure". On the contrary, it is virtually unknown. As explained earlier, if the doctrine does not cover cases in which appellants could obtain review by defying the law, it is a near-useless thing.

In support of its "familiar procedure" rationale, the Court of Appeals cites decisions of this Court which require a citizen who objects to a grand jury subpoena to make a choice between (1) complying with the district court's enforcement order prior to appellate review and (2) resisting the order for the sake of

obtaining review with the possibility that he will incur contempt penalties. *United States* v. *Ryan,* 402 U.S. 530 (1971); *Cobbledick* v. *United States,* 309 U.S. 323 (1940). In these cases, the Court held that orders denying motions to quash grand jury subpoenas are not appealable. Such appeals, the Court held, would result in undesirable delays in the enforcement of subpoenas and are justified by "the necessity for expedition in the administration of the criminal law." 402 U.S. at 533.

Here, on the other hand, there is a clear right to appeal. *Reisman* v. *Caplin,* 375 U.S. 440 (1964). The issue involved, whether compliance has rendered the case moot, was not involved in *Ryan* and *Cobbledick.* They stand only for the proposition that, in some cases, review *before* compliance can be had only by standing in contempt.[2] Contempt, in such cases, is the lesser of two evils. The evil of extended delay and the need for prompt compliance outweigh the evils of forcing a litigant to stand in contempt.

In contrast, mootness issues like that involved here arise only *after* compliance. If the individual, having complied, seeks appellate review, the appeal will be moot unless the case meets the criteria of the "capable of repetition, yet evading review" doctrine.

Application of the doctrine in these post-compliance situations also serves "the necessity for expedition." If the doctrine is not applied, a litigant for whom the issue is a recurring one will be pushed into non-compliance and delay in order to secure an appellate decision.

---

[2] This is, in essence, the same issue decided by the District Court, the Court of Appeals and Justice Brennan in denying a stay of the district court orders in this case.

The Attempt to Distinguish the Seventh Circuit Opinion Lacks Substance

The First Circuit's attempt to distinguish *In re Special April 1977 Grand Jury* is invalid both in its reasoning and in its treatment of the facts.

The First Circuit surmises that the subpoenaed government employees did not have a strong personal stake in resisting disclosure and could not be expected to stand in contempt to protect the right to appellate review. The opinion implies that it was proper under these circumstances for the Seventh Circuit to consider the merits of the appeal under the "capable of repetition, yet evading review" doctrine. The court surmises that Andersen, on the other hand, had a strong personal stake in resisting disclosure, giving it sufficient incentive to resort to contempt to preserve its right to appeal.

The court does not make clear why it thinks separate rules are desirable for different classes of litigants or why it is sensible to make appeal easier for those with little incentive than for those with a great incentive.

In any event, the court's factual distinction is entirely surmise, and experience suggests it is wrong. The distinction implies that the commitment of government employees to their convictions is less than that of employees of private concerns. There is no basis for that assumption. If anything, state employees would be more likely to risk contempt than private employees because they know, as a practical matter, that they are backed by the "majesty of the state" and are less likely to be personally punished.

But even if one were to accept the First Circuit's factual surmise, it argues for the opposite conclusion. If, as alleged, Andersen employees have a strong and continuing interest in non-disclosure of the documents in issue, that affirms that Andersen's controversy continues to possess a high degree of "concrete adversity" and is, therefore, not moot.

Moreover, the First Circuit's conclusion that contempt offers a satisfactory route to appellate review ignores the risks a litigant faces in defying a court order. These include the threat to his reputation as law-abiding and the direct threat of contempt penalties. The First Circuit belittles, to the point of ignoring, these factors.

Finally, whatever merit the First Circuit's purported distinction may have in explaining the Seventh Circuit case, it does not deal at all with the decisions of this and lower courts which hold issues not to be moot although appellants complied with laws or court orders they could have defied.

As a Means of Ensuring Concrete Adversity, Contempt Is a Very Undesirable Procedure Where Alternative Procedures Are Available

Whether or not contempt is a "familiar procedure," it is not a desirable procedure. It should be avoided where other lawful procedures can be made to work. A principal virtue of the "capable of repetition, yet avoiding review" doctrine is that it avoids the necessity for litigants to defy court orders, without sacrificing the need for "live controversy" and "concrete adversity."

Contempt is an undesirable procedure for several reasons:

First, because it encourages litigants, unnecessarily, to flaunt orders of the courts. This Court has observed:

> The interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. *United States* v. *United Mine Workers,* 330 U.S. 258, 303 (1947).

Those interests are undermined by requiring a citizen who wishes to preserve his legal rights to defy a court order, when no necessity exists for such a requirement.

Second, contempt is an undesirable procedure because it imposes a heavy and unnecessary burden on the appellant. A party faced with a summons enforcement order after a stay has been denied confronts a harsh dilemma. If he obeys the order he loses his ability to appeal. If he disobeys to preserve his appeal, he must be prepared to accept heavy fines or personal imprisonment. The burden of fines is obvious. Imprisonment, apart from the inconvenience, carries an aura of disgrace which is repugnant to citizens who wish to be law abiding.[3]

Where the "capable of repetition, yet evading review" doctrine applies, it avoids both these undesirable effects of the contempt procedure.

Failure to Clarify the Conflict Between Circuits Will Produce Injustice

This Court should make the options clear for litigants. Uncertainty will produce injustice.

If a litigant has no right to obtain review under the "capable of repetition, yet evading review" doctrine, he may irretrievably lose the opportunity for review by mistakenly counting on the doctrine and failing to defy the enforcement order. This will have happened to Andersen if the First Circuit's holding is not reversed.

If, on the other hand, a litigant has the right to obtain appellate review under the "capable of repetition, yet evading review" doctrine, he may nevertheless be led by the First Circuit's holding to commit contempt and endure its penalties in order to preserve his right to appeal.

---

[3] Public accountants are licensed by statute in every state. Not only criminal convictions, but also breaches of ethical standards and other improper conduct, may be grounds for license revocation and suspension. Contempt citations could adversely affect the accountants' reputation, thereby inhibiting their ability to perform these independent auditing functions.

Putting litigants in this unfair dilemma is unnecessary, but, given the conflict between Circuits, will persist until this Court decides the issue.

The Opinion Below Renders Illusory This Court's Promise of Appellate Review for Summons Enforcement

By denying a stay and then by dismissing the appeal as moot, the First Circuit deprived Andersen of a lawful means of appealing from the District Court's order.

In *Reisman* v. *Caplin,* 375 U.S. 440, 449-50 (1964), this Court declared that the summons enforcement provisions of the Internal Revenue Code provide "full opportunity for judicial review before any coercive sanctions may be imposed" and held that summons enforcement orders were appealable. The Court noted that "with a stay order a witness would suffer no injury while testing the summons."

The ruling of the First Circuit would render illusory the *Reisman* promise of appellate review.

Summary

The First Circuit has interpreted the "capable of repetition, yet evading review" doctrine in a manner inconsistent with the decisions of this Court and on a ground specifically rejected by the Seventh Circuit. The result is to render the doctrine largely meaningless. The rule announced by the First Circuit not only lacks justification, but would lead to affirmatively bad results. It would undercut the authority of the courts, would impose heavy and unjustifiable burdens on litigants, would promote delay in investigations, and would renege on this Court's prior promise of full opportunity for judicial review of IRS summons.

If allowed to stand, the First Circuit decision will unsettle a settled rule and lead to a new round of procedural uncertainty and unfairness, which must ultimately be resolved by this Court. There is no need for the issue to develop further in the

lower courts, as the doctrine in issue has been fully developed over a period of seven decades. The First Circuit's opinion is an aberration, but the conflict it raises is clear, focused and ready for resolution.

II. AS TO THE SUBSTANTIVE ISSUE: DISCLOSURE OF ACCRUAL PAPERS

The Court should grant the writ to review the standard of relevancy to be applied to requests by the IRS for tax accrual workpapers for the following reasons:

The Ability of the Accounting Profession to Function Effectively In the Public Interest Is At Stake

The question of IRS access to tax accrual workpapers presents a critical conflict between administrative convenience in the conduct of tax investigations and the ability of accountants to perform a significant and independent role.

On the one hand, the IRS has a great temptation to seek tax accrual workpapers from the corporation's independent accounting firm, because the opinions and thought processes revealed will, in the ordinary case, provide a roadmap for the IRS audit. On the other hand, granting the IRS free access to tax accrual workpapers will substantially impair the ability of the accountant to determine whether the company's financial statements fairly present its financial position.

If the IRS can, at will, obtain the independent accountant's work in identifying and evaluating each uncertain tax position of its client, the accounting profession will be perceived as and will become an auxiliary enforcement arm of the IRS and will lose its traditional free access to information from clients. The channels of client-accountant communication, which are critical to effective and efficient audits, will simply dry up.

Confronted with the unacceptable prospect of having insufficient data, the accounting profession will search else-

where for the necessary data. Audit activities will be expanded, resulting in excessive professional time commitments, increased fees, client resistance and a further deterioration of the confidential relationship between accountants and their clients.

Automatic access to the tax accrual workpapers will drive the process "underground." Good record keeping will be avoided. Oral communication will supplant good records and accountants will be pressured to do an increasing amount of their work in their heads. If there is to be no privacy for taxpayers or their professional advisors in thinking through their positions, the thinking process will be inhibited, if not suppressed. Positions will not be thought through for fear that doing so will raise potential issues, which once noted, will not go away regardless of their merits. Taxpayers will refrain from seeking competent professional advice if any questions they raise are to be routinely divulged to the IRS, and the quality of reporting, both tax and financial, will inevitably decline.

The success of a voluntary tax system depends upon charging taxpayers with responsibilities which they find generally reasonable. If the requirements are widely regarded as unreasonable or cut against the grain of human nature, the system will fail and no amount of penalties or coercion will make up for the loss of voluntary compliance. For this reason, a voluntary system which depends upon the taxpayer resolving all questions, however doubtful, in favor of the Government will not work. Nor will a system which requires the taxpayer to identify all potential questions so that the Government may then resolve them against the taxpayer.

There may be superficial appeal in the argument that compliance can be improved by stripping taxpayers and their professional advisors of privacy in their thought processes. But the fact remains that to require the routine disclosure of the kind of opinion material involved in these papers is to tamper with the wellspring of the system.

For all these reasons, the issue presented is of fundamental importance to the entire accounting profession, to the public and to the tax system.

The Court Below Confirms the Importance of the Issue

The First Circuit has itself emphasized the importance of the issue. It says generally of tax accrual workpapers:

> While such papers are said to constitute no part of the tax return or its workpapers, they would seem to indicate the thinking of accounting analysts and policy makers about tax decisions as to which the pros and cons may be in near balance, and thus indicate soft spots where IRS could profitably probe.
>
> The importance of the interests of all concerned — taxpayers, accountants and IRS — is clear. That a resolution sensitively reflecting the legitimate interests of all and faithful to applicable statutes would involve the most delicate and demanding analysis of facts, research of law, and reflection on policy is equally clear. Precisely because we view the issue of "relevance" as so significant, we find this case [i.e. the second appeal, by Good Hope] in a poor posture to serve as the matrix for a precedent. Op. at A-36.

The Court made these remarks in the context of the second appeal by Good Hope. But they deal with the general issue and could not be more apt in describing its importance.

This Appeal (Unlike Good Hope's Appeal) Is an Ideal Matrix for a Precedent

The Good Hope appeal (Dkt. 79-1405) referred to in the last sentence of the First Circuit statement quoted above, involved questions which were hypothetical, unknown and unasked. The kind of concreteness required for making precedent was totally absent.

Andersen's appeal, in contrast, involves facts which are fully developed and concrete, and which present the issue of document production in an ideally unambiguous form.

In Andersen's appeal, the court addressed the production of the tax accrual work papers, the issue raised here. It dismissed the appeal as moot because Andersen had complied with the order by producing the documents.

In Good Hope's appeal, decided subsequently, the court addressed a related, but different question, namely, the possibility that the IRS might question Andersen employees about the documents which had been produced. The district court order required Andersen to answer questions about those documents, if asked by the IRS. Good Hope argued, as questions had been neither asked nor answered, that this part of the order was not moot and should be reversed. The court agreed that this issue escaped mootness, but declined to reverse the order for another reason. The court pointed out that a determination on concrete facts would not be possible until specific questions were actually asked, which might never occur. Accordingly, it held that a decision was premature as to that part of the order.

We agree that the issue in the Good Hope appeal, dealing with unknown and unasked questions, is too speculative and abstract to provide "the matrix for a precedent."

In contrast, the issue in this appeal, which concerns production of the actual workpapers, has nothing abstract or speculative about it. The trial before the district court dealt with specific, known documents, and the facts were fully developed with testimony from both parties.

A clearer, more concrete case than this is unlikely. The issue is presented in bold relief. The Special Agent who issued the IRS summons admitted that he did not even know what tax accrual workpapers are. If, as the IRS contends, it has *carte blanche* to obtain production of virtually anything, the Special

Agent's testimony is irrelevant. But if, as Andersen contends, the IRS must make some particularized showing of expected relevance in order to obtain these sensitive, opinion documents, the Special Agent's testimony conclusively documents the failure to make that kind of showing.

In sum, the record is clear and factual and the facts are unambiguous. The workpapers are opinion-type documents and the IRS offers no reason to suppose that they supply any facts believed to be missing. If the IRS is entitled to production of the workpapers on this record, then the statutory requirement of "relevance" encompasses anything that might conceivably relate to some issue that the IRS might be interested in developing.

On the other hand, if the statutory "relevance" requirement requires some balancing of the interests in confidentiality against the legitimate need for discovery, then this case provides the clearest case for "non-relevance."

No better "matrix for precedent" can exist. A black-or-white case is presented. Once decided, subsequent cases can fill in any gray areas.

Andersen Seeks a Construction of "Relevance" That Would Protect the Interests of the IRS, the Taxpayer and the Public

The tax accrual workpapers have very marginal relevance to the IRS because they principally reflect after-the-fact opinions of third parties, and any numbers and facts to which they incidentally refer can ordinarily be obtained directly from primary sources. Andersen seeks a ruling which recognizes that there is a public interest in preserving the confidentiality of these sensitive, opinion-type documents and that the nature of the documents is such that the likelihood of their containing anything relevant is too slight to justify production, absent special circumstances. The factual record corroborates these conclusions.

Andersen has suggested the kind of circumstances under which examination of tax accrual workpapers would be justified and has proposed procedures for identifying such situations and for producing any relevant facts.

In general, Andersen proposes that the workpapers be found relevant only when the IRS shows a reasonable expectation that they are likely to contain factual data, excluding materials that constitute the accountant's mental processes and opinions, for which the IRS has substantial need and which it cannot reasonably obtain by other means. In the ordinary case, tax accrual workpapers would not be relevant, because all data contained in them are immediately available from primary sources, *i.e.*, the company's records, books and accounts — the same sources from which the workpapers take the facts they rely on. On the other hand, the IRS investigators would be granted access to the tax accrual workpapers to the extent they contain needed factual information not available elsewhere — for example, if they contain memoranda of factual statements by an officer of the taxpayer who is no longer available.

The construction of "relevance" sought by Andersen is designed to permit the accounting profession to serve the public effectively, to be consistent with traditional standards of relevance, to protect the legitimate interests of the IRS, and to accomplish all those results without burdening the courts.[4]

---

[4] The public importance of the issue is demonstrated by the attention of commentators. M. Caplin, "Should the Service Be Permitted to Reach Accountants' Tax Accrual Workpapers?" 51 J. Tax. 194 (1979); P. Reckers and L. Beard, "IRS Seeks Auditors' Working Papers," 48 CPA Journal 35 (1978); R. Hanson and C. Lees, "IRS Examination of Accountants' Workpapers," 143 J. Accountancy 60 (1977); M. Saltzman, "Accountants and the IRS Summons: Recent Developments," 7 Tax Adviser 516 (1976).

The need is pressing, in the words of the First Circuit quoted earlier, for

> "... a resolution sensitively reflecting the legitimate interests of all ..." Op. at A-36.

The Issues In This Case Are Closely Related to Those in the *Upjohn* Case, for Which This Court Has Just Granted Certiorari

The rule which Andersen urges in this case is akin to the rule applicable to attorney work product announced in *Hickman* v. *Taylor,* 329 U.S. 495 (1947).

In *Hickman,* this Court fashioned a rule which protected attorneys' work product papers from disclosure on demand, but made them available on a limited basis where specific need was shown. Andersen does not contend that the *Hickman* work product rule, devised for attorneys' papers, applies to these accountants' workpapers or that any privilege is involved. But it does contend that the principles underlying the *Hickman* rule are also present here and that a similar result is appropriate.

On March 17, 1980, this Court granted certiorari in a case which involves the role of the *Hickman* work product rule in IRS summons enforcement cases under Section 7602. *The Upjohn Co.* v. *United States,* No. 79-886, 48 U.S.L.W. 3481, 3602 (1980).

Upjohn raises in the context of attorneys the same kind of issue raised here in the context of accountants. Both *Upjohn* and this petition raise issues about:

1. The balancing of competing interests. The IRS' administrative convenience in obtaining access to a professional's work papers must be balanced against the policy considerations which argue for granting qualified protection to communications between taxpayers and their professional advisors.

2. The "relevance" under *United States* v. *Powell,* 379 U.S. 48 (1964), of opinion-type work products which are

based on facts taken from original source records equally available to the government.

3. The showing required to be made by the IRS to support enforcement of the summons for third party papers containing opinions and thought processes.

In addition to their similarities, *Upjohn* and Andersen's case have two significant differences, which would help flesh out the Court's consideration of this vital issue of IRS summons power:

1. *Upjohn's* claim is broader than Andersen's because the petitioner in *Upjohn* claims "work product" protection for all of an attorney's papers evaluating contingencies in anticipation of litigation. Andersen, on the other hand, seeks to invoke a balancing test for only a limited class of workpapers which discuss contingencies affecting the tax accrual.

2. Andersen's claim is broader than *Upjohn* in that it seeks to apply the policy considerations involved to another class of professional advisors, public accountants.

The substantive issue raised in this petition is related and complementary to that raised in *Upjohn*. Resolving both these cases will give the Court better perspective on the important policy issue which is raised in slightly different contexts, and will avoid the possibility of deciding the issue in one context with language that unwittingly creates mischief in the other context. The issue is of great importance to both professions and to the publics which they respectively serve.

The Decision of the First Circuit Creates a Conflict Between Circuits

In the Good Hope appeal, the Court of Appeals affirmed the district court's order enforcing the IRS summons to Andersen.[5] The district court held that the IRS can obtain tax accrual

[5] In Andersen's appeal, the Court of Appeals simply dismissed the appeal as moot without either affirming or reversing the District Court's order.

workpapers if some of the agents involved in the investigation know what they are and ask for them. The district court expressly rejected the holding of the Tenth Circuit that tax accrual workpapers are not ordinarily relevant to tax investigations within the meaning of Section 7602. *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977), *aff'g.* 413 F. Supp. 942 (D. Colo. 1975).

Insofar as the holding of the First Circuit here affirms the order of the district court, it is in direct conflict with that of the Tenth Circuit in *Coopers & Lybrand.*

Prior to the First Circuit decision, *Coopers & Lybrand* was the only case involving IRS access to tax accrual workpapers. Its holding was unequivocal and reassuring to taxpayers, although the IRS has taken the view that it was wrong. The present case has unsettled all that *Coopers & Lybrand* had settled. After this case was decided, the IRS revised its operating Manual (as noted) to reassert more strongly its right to tax accrual workpapers.

Like a Gresham's law, the bad drives out the good. Taxpayers conduct their affairs on the basis that the worst may happen and this *Andersen* decision has shown what the worst may be. Already, taxpayers and their professional advisors are discussing ways to rearrange traditional lawyer-accountant roles in an effort to shelter this sensitive opinion-type material with some privilege or greater protection. Already, taxpayers are avoiding the participation of their accounting advisors in certain activities and pushing them to reduce less and less to paper. Already the channels of communication are perceived as drying up. The First Circuit decision, by its mere existence, is changing public behavior in ways which are detrimental to the public interest, the accounting profession and the administration of the tax system.

The conflict that has developed is substantial and the issue is important. It is now focused and this case presents it clearly and simply. Certiorari has been granted in the *Upjohn* case, involving similar issues and facts as they relate to lawyers. This Court should resolve the issue as it relates to the accounting profession.

CONCLUSION

Petitioner respectfully requests that the petition for a writ of certiorari be granted.

J. READ MURPHY
Murtha, Cullina, Richter,
and Pinney
101 Pearl Street
Hartford, Connecticut 06103

DONALD DREYFUS
Arthur Andersen & Co.
69 W. Washington Street
Chicago, Illinois 60602

Of Counsel

FREDERIC W. HICKMAN
MICHAEL M. CONWAY
WM. CARLISLE HERBERT
Hopkins, Sutter, Mulroy,
Davis & Cromartie
One First National Plaza
Suite 5200
Chicago, Illinois 60603
(312) 558-6600

Attorneys for Petitioner

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 79-1411

UNITED STATES OF AMERICA and
FRANCIS W. MURPHY
Special Agent, Internal Revenue Service,
PETITIONERS, APPELLEES,

v.

ARTHUR ANDERSEN & COMPANY,
RESPONDENT, APPELLANT,

and

GOOD HOPE INDUSTRIES, INC.,
INTERVENOR, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Frederic W. Hickman, with whom *John L. Conlon*, *Michael M. Conway*, *Wm. Carlisle Herbert*, *Hopkins, Sutter, Mulroy, Davis & Cromartie*, *J. Read Murphy*, *John T. DelNegro* and *Murtha, Cullina, Richter & Pinney* were on brief, for appellant.

Carleton D. Powell, Attorney, Tax Division, Department of Justice, with whom *M. Carr Ferguson*, Assistant Attorney General, *Edward F. Harrington*, United States Attorney, *Gilbert E. Andrews* and *Robert E. Lindsay*, Attorneys, Tax Division, Department of Justice, were on brief, for appellees.

Kenneth J. Bialkin, *Louis A. Craco*, *Howard C. Buschman, III.*, *Michael P. Zweig* and *Willkie, Farr & Gallagher* on brief for American Institute of Certified Public Accountants, amicus curiae.

March 31, 1980

COFFIN, *Chief Judge*. This is an appeal from an order of the United States District Court for the District of Massachusetts

enforcing an Internal Revenue Service summons issued to the appellant, Arthur Andersen & Co. ("Andersen"). Andersen's appeal asserts that this summons did not meet the relevance requirement of 26 U.S.C. §7602.[1] The IRS, in addition to arguing the propriety of the district court's order enforcing its summons, filed a motion to dismiss Andersen's appeal as moot. Because we find the question of mootness dispositive, we do not reach the merits of Andersen's appeal.

The summons at issue in this case was served upon Andersen in the course of an IRS investigation of Good Hope Industries, Inc., ("Good Hope"), for whom Andersen had acted as auditor and tax advisor for the fiscal years ending July 31, 1973 through 1976. The IRS directed Andersen to produce and to testify about various records and workpapers related to its auditing and tax planning work for Good Hope. Andersen

---

[1]Section 7602 defines the scope of the IRS's authority to obtain documents and testimony:

> "For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee of fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized-
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry;
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

The burden of proof is on the IRS to show that a summons "may be relevant" to a legitimate purpose for its investigation. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964).

resisted producing its audit work programs, tax planning papers, and tax accrual audit workpapers.[2] The district court, after holding an evidentiary hearing, ordered Andersen to comply with all aspects of the summons.[3] Motions for a stay of the court's enforcement order were denied first by the district court and then by this court.[4] After filing its notice of appeal from the district court's order,[5] Andersen complied with the summons by producing all the documents requested by the IRS. In this appeal, Andersen has challenged only that part of the order requiring the production of the tax accrual workpapers prepared in conjunction with its audit of Good Hope.

Since Andersen has produced all of the documents forming the subject matter of this appeal, the controversy presented to this court appears, on its face, to be moot. *See United States* v. *Lyons*, 442 F.2d 1144 (1st Cir. 1971) (dismissing as moot an appeal by a taxpayer of an order enforcing an IRS summons that had been complied with). *See also Barney* v. *United States*, 568 F.2d 116 (8th Cir. 1978); *United States* v. *Carpenter*, 425 F.2d 264 (5th Cir. 1970). Andersen seeks to avoid the preclusive effect of the mootness doctrine by invoking the "capable of repetition yet evading review" exception recog-

---

[2]"Tax accrual workpapers" are produced by accountants such as Andersen in conjunction with the auditing of financial statements required for companies that file financial statements with the SEC. Part of the auditing function is to evaluate the sufficiency of the client's reserves to meet its potential tax liability. This evaluation is based in part on the accountant's analysis of corporate records and in part on its assessment of opinions and projections communicated in confidence by the client. In reaching its conclusion, the accountant considers all uncertain tax positions taken by the client and determines the extent of reserves necessary to cover the liability that would result assuming that all such questions were resolved against the client.

[3]26 U.S.C. § 7604 provides for judicial enforcement of summonses issued pursuant to section 7602.

[4]Justice Brennan, acting as circuit justice, denied a petition for a stay submitted by Good Hope.

[5]Orders for enforcement of IRS summonses issued pursuant to 26 U.S.C. § 7604 are final orders appealable under 28 U.S.C. § 1291. *Reisman* v. *Caplan*, 375 U.S. 440, 449 (1964).

nized by the Supreme Court in *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). An action falls within this exception if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).[6]

We are satisfied that this case meets the latter prong of the exception — that the controversy be sufficiently likely to be repeated. In May of 1979, the Chief Counsel of the IRS stated in an address to the Federal Tax Division of the American Institute of Certified Public Accountants that the IRS would actively seek access to accountants' workpapers in connection with its investigations and that recurring litigation over summonses of the type at issue in this case was likely. Andersen is one of the nation's largest accounting firms; one or more of its clients is likely to be subjected to tax investigations in which the IRS would demand from Andersen its tax accrual workpapers for that client.[7] The likelihood of recurrence here is at least as great as in other cases in which the Supreme Court has found the "capable of repetition yet evading review" exception applicable. *See, e.g., Gannett* v. *DePasquale*, 47 U.S.L.W. 4902, 4904-05 (U.S. June 26, 1979) (sufficient

[6]The government, in its motion to dismiss Andersen's appeal, argues that our decision in *United States* v. *Lyons*, 442 F.2d 1144 (1st Cir. 1971), precludes Andersen from relying on the "capable of repetition yet evading review" exception. This reliance is misplaced. In *Lyons*, we found that there was no likelihood of future similar controversies between the taxpayer and the IRS. Moreover, we noted that if and when a proceeding was initiated against the taxpayer, he would have sufficient opportunity to contest the IRS summons at trial. Neither of these grounds for the *Lyons* decision is applicable in this case.

[7]An affidavit submitted by Andersen's in-house counsel states that since January 1, 1975, Andersen has received fifteen summonses and two subpoenas from the IRS for production of documents including tax accrual workpapers.

likelihood that newspaper will again be enjoined from publishing aspects of criminal proceeding); *United States* v. *New York Telephone Co.*, 434 U.S. 159, 165 (1977) (sufficient likelihood that telephone company will again be ordered to assist FBI in performing pen register surveillance).

The basic requirement of the exception — that the question be one that will otherwise evade review — presents a more difficult problem. Andersen argues that the strong policy opposing delays in the enforcement of IRS summonses makes it unlikely that a district court would set a compliance date that would allow time for a prior appeal. *Cf. United States* v. *Salter*, 432 F.2d 697, 700-01 (1st Cir. 1970) (public policy militates against permitting taxpayer to engage in discovery in proceeding for enforcement of IRS summons since delay would "jeopardize the integrity and effectiveness" of the investigation). Andersen argues further that the difficulty in meeting the "likelihood of success" and "irreparable harm" requirements for a stay pending appeal make this an equally unavailable avenue for obtaining review of an enforcement order prior to compliance. Finally, since Andersen is not likely to be a party to any judicial proceeding arising out of Good Hope's tax deficiency, it will have no future opportunity to litigate the validity of the summons.

There is, however, one remaining means for a third party to obtain appellate review of such an enforcement order: it can refuse to comply and litigate the merits of the summons as a defense to a contempt citation. In its brief opposing the government's motion to dismiss this appeal as moot, Andersen acknowledges this possibility, but argues that "a person should not be required to stand in contempt of a court order to obtain appellate review." As support for this assertion, Andersen cites the Seventh Circuit's recent decision in *In re Special April 1977 Grand Jury*, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1979), which permitted a post-compliance appeal from an order enforcing grand jury subpoenas. In that case the

court stated "the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test." *Id.* at 591, *citing Nebraska Press Association* v. *Stuart*, 427 U.S. 539 (1976); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978).

We see two difficulties with Andersen's reliance on *In re Special Grand Jury*. First, the case is distinguishable in one important aspect. The grand jury subpoenas at issue were directed at members of the appellant's staff, not the appellant himself. It would be unreasonable to expect individuals with no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply. *Cf. Perlman* v. *United States*, 247 U.S. 7 (1918) (interlocutory appeal from discovery order permitted when order directed to person other than appellant who has insufficient incentive to risk contempt). Here, in contrast, although Andersen is not the immediate target of the IRS investigation, it has asserted strenuously that it is damaged by the disclosure of these workpapers to the IRS. According to Andersen, its ability to obtain information from its clients necessary to perform its auditing function properly will be seriously impaired. This asserted interest provides sufficient incentive for Andersen to take all available steps to avoid disclosure. *See In re Oberkoetter*, No. 79-1580, slip op. at 6 (1st Cir. Jan. 4, 1980) (attorney would have adequate incentive to risk contempt to avoid testifying against his client).

Second, the Supreme Court decisions cited by the Seventh Circuit in *In re Special Grand Jury* do not lead inevitably to the conclusion that a litigant need not incur a contempt citation before meeting the "evading review" test. It is true that in *Nebraska Press Association* the court applied the mootness exception even though the newspaper publishers who were enjoined from reporting certain facts regarding an ongoing trial could have tested the court's order by violating it and contesting the resulting contempt sanction. Similarly, in *First*

National Bank of Boston the Court noted that the criminal penalties imposed by a Massachusetts statute prohibiting certain political expenditures by banks "discourage challenge by violation". Both of these cases, however, involved prior restraints on arguably protected speech. We believe the Court's unwillingness to require the parties in these cases to invite criminal sanctions in order to obtain appellate review more probably reflected the Court's traditionally disapproving view of prior restraints on speech than a broadly applicable statement on the scope of the capable of repetition yet evading review" exception.

Well established doctrine regarding the appealability of interlocutory orders suggests that the burden of incurring a contempt citation is not an unreasonable one to impose on a party seeking review of a question that will otherwise become moot. In *United States* v. *Ryan*, 402 U.S. 530, 533 (1971), the Supreme Court stated that interlocutory review of grand jury subpoenas was available only when denial would render "any review whatsoever", including defense to contempt, impossible. *See also Cobbledick* v. *United States*, 309 U.S. 323 (1940); *In re Oberkoetter*, *supra*. Similarly, in the context of subpoenas issued for discovery pursuant to rule 45 of the Federal Rules of Civil Procedure, the general rule is that interlocutory review of orders with regard to such subpoenas may be obtained only as a defense to a contempt citation. *See Grinnell Corp.* v. *Hackett*, 519 F.2d 595, 596-98 (1st Cir. 1975); *Ryan* v. *Commissioner*, 517 F.2d 13, 18-20 (7th Cir. 1975); *United States* v. *Fried*, 386 F.2d 691, 694-95 (2d Cir. 1967); C. Wright & A. Miller, *Federal Practice & Procedure* § 2463 (1971). *But see Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). In *Grinnell Corp.*, we dismissed an interlocutory appeal, holding that a discovery order did not meet the requirements of an appealable collateral order in part because it was not a question that would otherwise evade review. In reaching this conclu-

sion we noted that appellants could have availed themselves of the "familiar procedure" of risking a contempt citation in order to obtain appellate review. 519 F.2d at 598 (citing *Maness* v. *Meyers*, 419 U.S. 449 (1975); *United States* v. *Ryan*, *supra*).

In the case at bar, Andersen seeks review because it faces the prospect of repeated orders to produce its tax accrual workpapers for other clients. In addition, the American Institute of Certified Public Accountants, as *amicus curiae*, argues that the continued use of IRS summonses for such workpapers would have a broad detrimental impact on the accounting industry. We are aware that this case differs from the appealability cases noted above because the consequence of our denial of jurisdiction here is final foreclosure of Andersen's opportunity to appeal, rather than merely delay of an appeal until a final judgment has been obtained. But to the extent that the issue sought to be reviewed is of such assertedly vital importance to both Andersen and the industry, it does not seem too draconian to insist on resort to contempt in order to preserve the issue for appeal.

Finally, while it is tempting to base a decision to review the merits of this case on the significance of the issue presented, as Andersen urges, neither precedent nor sound judicial policy favor such a course. *See Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974). Contrary to Andersen's assertion, the Supreme Court's decision in *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974), is not applicable here. In *Super Tire*, the Court did note that the judiciary "must not close the door to the resolution of the important questions" presented in that case. *Id.* at 127. But the issue raised by appellants in *Super Tire*, who sought a declaratory judgment that public assistance was not available to workers engaged in an already-terminated economic strike, could not have been saved from mootness by any reasonable action on the part of the appellants. Moreover, we can conceive of no principled basis for adjudicating claims that particular issues or controversies fall

within an "importance exception" to the mootness doctrine.

In conclusion, we hold that in the absence of some compelling circumstances that militate in favor of our deciding an otherwise moot case, the "capable of repetition yet evading review" exception is not available to a litigant aggrieved by a summons or subpoena who could have avoided mootness by refusing to comply. Because we find no such compelling circumstances in this case and because we conclude that Andersen had sufficient incentive to risk contempt in order to avoid compliance with this summons, the appeal is dismissed as moot.

Appeal dismissed.

Adm. Office, U. S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA and FRANCIS W. MURPHY, Special Agent, Internal Revenue Service,

Petitioners,

v.

ARTHUR ANDERSEN & COMPANY,

Respondent,

and

GOOD HOPE INDUSTRIES, INC.,

Intervenor.

Civil Action No. 78-3227-F

MEMORANDUM

July 23, 1979

FREEDMAN, D.J.

FACTS

This action is brought pursuant to Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954, 26 U.S.C. §§ 7602(b), 7604(a), seeking judicial enforcement of an Internal Revenue summons. Petitioner Francis V. Murphy is a Special Agent of the Internal Revenue Service (IRS), who is empowered to issue summons under authority granted to IRS by Section

7602 of the Internal Revenue Code of 1954, 26 U.S.C. § 7602. *See also* Treasury Regulation § 301.7602-1, 26 C.F.R. §301.7602-1; and IRS Delegation Order No. 4 (Rev. 4, August 22, 1977), 42 Fed. Reg. 42915 (1977). Respondent Arthur Andersen & Company (Arthur Andersen) is a nationally-known accounting firm with offices in both Boston, Massachusetts and Hartford, Connecticut.

Petitioner is investigating the tax liability of Good Hope Industries, Inc. (Good Hope), intervenor herein, and its subsidiaries, which was heretofore the subject of a two-year audit by Revenue agents covering the fiscal years ending July 31, 1973, July 31, 1974, July 31, 1975 and July 31, 1976. Respondent has provided various professional services to Good Hope for the years in question, including auditing and preparation of financial statements, and tax preparation for the years ending July 31, 1973, 1974, and 1975.

On November 14, 1977, Special Agent Murphy issued a summons under 26 U.S.C. § 7602[1] directing respondent Arthur

---

[1] 26 U.S.C. § 7602 provides:

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax . . . or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) to summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give

Footnote continued on next page.

Andersen to appear on November 30, 1977 to testify and to produce for examination certain statements, records, and papers allegedly relating to tax liabilities of Good Hope.[2] Re-

Footnote continued from previous page.

such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

[2] The summons sought:

(1) Opinions, consolidated financial statements, and accompanying notes to the consolidated financial statements of GOOD HOPE INDUSTRIES, INC. and SUBSIDIARIES, 622 State Street, Springfield, Massachusetts for the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76. Also, any consolidated financial statements with accompanying notes for any interim periods during the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76.

(2) All workpapers, analyses and/or summaries relative to the preparation and/or audit of the consolidated financial statements and accompanying notes to the consolidated financial statements of GOOD HOPE INDUSTRIES, INC. and SUBSIDIARIES for the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76. Also, any workpapers, analyses, and/or summaries relative to any consolidated financial statements with accompanying notes for any interim periods during the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76.

(3) All workpapers, analyses, and/or summaries relative to the preparation of the Federal Consolidated Corporate Income Tax Returns of GOOD HOPE INDUSTRIES, INC. and SUBSIDIARIES, 622 State Street, Springfield, Massachusetts for the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76.

(4) Financial statements, accompanying notes to the financial statements, all workpapers, analyses, and/or summaries relative to the preparation and/or audit of the financial statements and all workpapers, analyses, and/or summaries relative to the preparation of the Federal Corporate Income Tax Returns for the fiscal years ending 7/31/73, 7/31/74, 7/31/75, and 7/31/76 pertaining to GOOD HOPE INDUSTRIES, INC. and ten subsidiaries. Also, any financial statements with accompanying notes for any interim periods during the fiscal years ending 7/31/73,

Footnote continued on next page.

spondent was personally served by in-hand delivery to the managing partner of its Hartford, Connecticut office, where the bulk of the records sought are located. On that same day, Special Agent Murphy mailed notice of service of summons upon a third party record-keeper to the taxpayer, Good Hope, as required by 26 U.S.C. § 7609(b). Neither Arthur Andersen nor Good Hope have questioned service. In a timely and proper manner, Good Hope directed Arthur Andersen not to comply with the summons, temporarily staying compliance under the terms of 26 U.S.C. § 7609(b)(2). At all relevant times, Good Hope has been debtor-in-possession under a Chapter XI Bankruptcy proceeding.

After intermittent attempts to negotiate mutually agreeable conditions for production of the requested material, an enforcement action was brought against Arthur Andersen in the District of Connecticut (Misc. Civil Action H-78-37) on November 3, 1978. Good Hope exercised its right to intervene. 26 U.S.C. § 7609(b)(1). After a hearing on December 11, 1978, and over the objection of the government, the District Court, Clarie, C.J., granted Respondent's motion for change of venue under 28 U.S.C. § 1404. The Court noted that

> the corporation is a Massachusetts corporation and its principal place of business is in Massachusetts, its main conduct of that business is Massachusetts, it is in bankruptcy in Massachusetts, the original subpoena was issued to Springfield, Massachusetts; but notwithstanding the

---

Footnote continued from previous page.

7/31/74, 7/31/75, and 7/31/76 and any workpapers, analyses, and/or summaries relative to the preparation of any interim financial statements with accompanying notes for the above-named corporations.

(5) All correspondence including intercompany memorandums and consultation and/or management letters or memorandums relative to the GOOD HOPE INDUSTRIES, INC. or any of its subsidiaries.

records, the records are temporarily, presently in Hartford, they have been ordered to be produced in Boston by the Bankruptcy Court; and the Court is of the opinion that that order is subject to review pursuant to this Court's order by

The case came before me for hearing on March 22, 1979. After hearing testimony and argument, I allowed the parties extra time to file memoranda and affidavits, whereupon I took the case under advisement.

QUESTIONS PRESENTED

As an initial matter, Arthur Andersen concedes its obligation to produce documents in many of the requested categories, under certain circumstances. Petitioner's Brief at 3.[3] As a matter of law this is correct, for extraction of possibly incriminating information from third party record-keepers "is a necessary part of the process of law enforcement and tax investigation." *Couch v. United States,* 409 U.S. 322, 329 (1972).

---

[3] Unfortunately, the parties do not share a common terminology. Arthur Andersen categorizes its Good Hope files in this manner:

1. Audit Workpapers including:
   a. Audit Engagement Letters
   b. Audit Work Programs
   c. Financial Statements
   d. Audit Schedules
   e. Tax Accrual Workpapers
   f. Audit Reports
   g. Miscellaneous correspondence
2. Tax Return Workpapers including:
   a. Tax Arrangement Letters
   b. Tax Schedules
   c. Tax Returns (copies)
   d. Correspondence
3. Tax Planning and Consultation Papers
4. Administrative Services
5. Billing and Time Sheets

Petitioner's Brief at 3. It objects to production of its Audit Work Programs, Tax Accrual Workpapers, and Tax Planning and Consultation papers.

Good Hope and Arthur Andersen focus their objection to compliance on two grounds:

1) That existence of a bankruptcy proceeding involving the taxpayer makes the Bankruptcy Court the appropriate forum for determination of any tax liability;

2) That IRS is not entitled to production of all the particular documents sought on two theories:

a) an accountant/client privilege, akin to the lawyer/client privilege

b) relevancy, in that the challenged documents were not used in preparation of tax returns.

BANKRUPTCY

Intervenor Good Hope has urged that, after commencement of bankruptcy proceedings, jurisdiction to determine tax liability passes to the Bankruptcy Court by virtue of its authority to:

> Hear and determine any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction. . .

11 U.S.C. § 11(a)(2A).

I am not called upon to address this contention today, for the District Court's jurisdiction is based on quite different grounds. The summons in question was issued under 9 grant of authority:

> [f]or the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax, . . . or collecting any such liability. . .

26 U.S.C. § 7602.

This investigative power has been repeatedly characterized as an inquisitorial power, analogous to that of a grand jury. *See United States v. Matras,* 487 F.2d 1271, 1274 (8th Cir. 1973) and cases cited therein. As such, IRS does not depend on a case or

controversy for power to get evidence, "but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Powell,* 379 U.S. 48, 57 (1964); *see also United States v. Bisceglia,* 420 U.S. 141, 146 (1974).

It therefore seems clear that exercise of jurisdiction to enforce IRS summonses, under 26 U.S.C. §§ 7402(b) and 7604(a) does not necessarily intrude upon the jurisdiction of the Bankruptcy Court. The scope of allowable purposes for issuance of summonses encompasses a number of situations in which no assessment will result, as where IRS determines from the summoned materials that tax liability was correctly reported. Likewise, the result may be purely prospective, as where IRS seeks to determine the correctness of depreciation taken in prior years as it bears on the amount available currently. I conclude that the fact that material obtained by exercise of summons power may at some point be used in a proceeding properly before the Bankruptcy Court does not deprive this Court of jurisdiction over the issuance of such summonses.[4]

Intervenor next argues that Rule 11-44 of the Bankruptcy Rules of Procedure automatically stays all action against a debtor who files a Chapter XI petition.[5] Courts have construed

---

[4] In an analogous situation, tolling of the statute of limitations has not been held to bar investigation for time barred years, where the information sought might be relevant to open years. *United States v. Giordano,* 419 F.2d 564, 568 (8th Cir. 1969), *cert. denied* 397 U.S. 1037 (1970); *Dunn* v. *Ross,* 356 F.2d 664, 666 (5th Cir. 1966); *see also United States v. Powell,* 379 U.S. 48, 57 (1964).

[5] Rule 11-44(a) provides:

A petition filed under Rule 11-6 or 11-7 shall operate as a stay of the commencement or the continuation of any court or other proceeding against the debtor, or the enforcement of any judgment against him, or of any act or the commencement or continuation of any court proceeding to enforce any lien against his property, or of any court proceeding, except a case pending under Chapter 10 of this title, for the purpose of the rehabilitation of the debtor or the liquidation of his estate.

the purpose behind Rule 11-44, and the underlying 11 U.S.C. § 714, as being "to prevent possible frustration of the rehabilitation effort through prejudicial dismembership or the adverse disposition of assets." *Bohack Corp. v. Borden, Inc.*, 450 F.Supp. 367, 374 (E.D. N.Y., 1978); see also 14, *Collier on Bankruptcy*, ¶ 11-44.02. To compel production of documents will neither interfere with, nor diminish the debtors' property during the pendancy of the Chapter XI proceedings, *Teledyne Industries Inc. v. Eon Corp.*, 373 F.Supp. 191, 203 (S.D. N.Y. 1974), where, as here, the documents are not in the hands of the debtor-in-possession, and will be returned to their custodian.

I thus find that neither the pendancy of bankruptcy action, nor the provisions of Rule 11-44, operate to deprive this Court of jurisdiction to enforce an IRS summons.

ACCESS TO PARTICULAR DOCUMENTS

Good Hope and Arthur Andersen next raise objections to production of the particular documents sought. The argument is in two parts: a claim of privilege as to three classes of documents, and a claim based on *United States v. Powell*, 379 U.S. 48 (1964) as to all documents.

Accountant/Client Privilege

Good Hope takes this opportunity to urge that the Court recognize a privilege between accountant and client, akin to the privilege recognized between attorney and client. *See* Intervenor's Brief at 14. In support of this proposition, both Good Hope and Arthur Andersen have submitted numerous affidavits addressing the need for confidentiality between accountant and client in order that frank disclosure might be fostered, the similarity of function between accountant and lawyer in the tax field, and the similar manner in which both professions are

regarded by the public. They argue that such privilege is particularly appropriate as to Audit Work Programs, Tax Accrual Workpapers and Tax Planning and Consultative Papers.[6] While I appreciate that valid policy questions are raised by the issues presented in this case, I am not inclined to recognize an accountant/client privilege on these facts. The expansive language of Section 7602, authorizing the summo-

---

[6] Witnesses for Arthur Andersen offered, and the government did not object to the following definitions:

Audit Work Program: An audit work program is a document prepared for every audit engagement, which outlines the audit procedures that are to be applied to each of the accounts during the course of the audit.

* * *

Each person performing one of those audit procedures is supposed to sign the program with his initials that they have completed it. Transcript at 100.

Tax Accrual Workpapers: The tax accrual workpapers would consist of two or three basic documents. One would be a summary analysis of the transactions requested in the company's general ledger with respect to its income tax accounts. This analysis would show the amounts provided in the financial statements for the taxes for that year. It would show dates of payments and any other miscellaneous adjustments which might affect the balance of the accrual at the end of the year.

It would also include a computation of the tax provision for the current year, whether or not the tax is payable in that year.

A third major category of papers would be a memorandum discussing any items reflected in the financial statements as an income or any expense where the ultimate tax treatment is unclear.

The memorandum would discuss each of these items with the objective of making a determination as to whether a tax provision should be made to cover the tax on that item either at the date of filing the return or the date of examination. Transcript at 101-102.

Tax Planning Memorandum: It would contain essentially the observations and conclusions that the tax partner or tax personnel might have regarding the tax posture of the client. It would contain suggestions, let's say, for programs of tax minimization. It might contain observations about transactions that had already been completed with ideas as to what the exposures might be and as to what alternative positions might be taken. Transcript at 115.

ning of "*any* person" for the taking of testimony and examination of "books, papers, records, or other data," invites liberal construction. Settled principles of statutory construction teach that we should be very hesitant to exempt a significant group from the broad sweep of § 7602, absent unambiguous directions from Congress. *United States v. Bisceglia,* 420 U.S. 141, 150 (1974). Applying this principle to the case at hand, and noting that the Supreme Court has explicitly stated "that no confidential accountant/client privilege exists under federal law...," *Couch v. United States,* 409 U.S. 322, 335 (1972), I see no grounds for establishing an accountant/client privilege as to the Audit Work Programs, Tax Accrual Workpapers, and Tax Planning and Consultation Papers, or any other documents enumerated in the summons.

Right to Documents Requested

Arthur Andersen and Good Hope also argue that even if the material summoned is not inherently privileged, it is nonetheless unavailable to the government on the facts of this case. I note initially that IRS lacks inherent authority to summon production of private papers, being limited to the exercise of authority granted to it by Congress. *United States v. LaSalle National Bank,* 437 U.S. 298, 317 (fn. 18) (1978). I note further than an IRS summons can be enforced only by the courts. 26 U.S.C. §§ 7402(b), 7604(b); *see United States v. Bisceglia,* 420 U.S. 141, 146 (1975). When a summons is challenged, the court is required to scrutinize it "to determine whether it seeks information relevant to a legitimate investigative purpose." *United States v. Bisceglia, supra* at 146.

In conducting such scrutiny, the touchstone is a set of standards first enunciated by the Supreme Court in *United States v. Powell,* 379 U.S. 48 (1964). The Court there identified four conditions to be satisfied before a § 7602 summons would be enforced:

(1) That the investigation will be conducted pursuant to a legitimate purpose,

(2) that the inquiry may be relevant to the purpose,

(3) that the information sought is not already within the Commissioner's possession, and

(4) that the administrative steps required by the Code have been followed

Powell, supra at 57-58.

(1) A "legitimate purpose," as used in *Powell*, requires that the production not be sought in furtherance of a purely criminal investigation. *See e.g. Donaldson v. United States*, 400 U.S. 517, 533 (1970); *accord United States v. LaSalle National Bank, supra* at 306-07. The summons power of § 7602 is not available to broaden the scope of criminal discovery. *United States v. LaSalle National Bank, supra* at 312.

Respondent has sought to establish a general intent on the part of IRS to conduct such a criminal investigation. Transcript at 50-52. By its very nature, a tax investigation may raise questions of both criminal and civil liability. *See e.g. United States v. LaSalle National Bank, supra* at 309; *United States v. Crespo*, 280 F.Supp. 928, 935 (D.Md. 1968). Recognizing this, the Supreme Court has refused to draw a line barring the use of summons power merely because a Special Agent has entered the case. *Donaldson* v. *United States*, supra at 535.

The Supreme Court has formulated a two-pronged test to determine the legitimacy of the summons, and has placed the burden on those opposing the enforcement of the summons "to disprove to the actual existence of a valid civil tax determination or collection purpose by the Service." *United States* v. *LaSalle National Bank, supra* at 316.

The Court in *LaSalle* established, first, that "the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution which would

reasonably relate to the subject matter of the summons, but undertaken." Id. at 318. Through affidavit in support of the Petition for Enforcement, and through testimony before me, (Transcript at 45), Special Agent Murphy has represented that from the time of issuance of the summons to the time of the hearing, no recommendation for criminal prosecution has been made to the Department of Justice. Arthur Andersen and Good Hope do not deny these representations.

The second element of the *LaSalle* test requires that "the Service at all time must use the summons authority in good-faith pursuit of the Congressionally authorized purposes of §7602 . . . . " *Id.* at 318. This determination is to be made by reference to the institutional posture of the Service. Id. at 316. Arthur Andersen and Good Hope have sought to establish bad faith by pointing again to the Chapter XI Bankruptcy proceedings.

They argue that filing of proof of claim in the Chapter XI Bankruptcy proceeding in April 1978, after issuance of the summons, terminated the civil element of the proceedings. They therefore suggest that enforcement could only be in furtherance of solely criminal proceedings. However, as noted above, I find that the jurisdiction of the Bankruptcy Court to determine "any question arising as to the amount or legality of any unpaid tax" 11 U.S.C. §11(a)(2A) neither necessary conflicts with, nor bars, the power of IRS to summon for "the purpose of ascertaining the correctness of any return, making a return where none has been made, [and] determining the liability of any person for any internal revenue tax . . . ." 26 U.S.C. §7602. Consequently, I hold that the summoned document may be pertinent with respect to adjustment of the claims already filed, and with respect to new claims for the year 1976.[7]

---

[7] The government asserts that the proofs of claim filed in bankruptcy for the years 1973, 1974 and 1975, and subsequent to the

Footnote continued on next page.

Therefore, on the basis of Special Agent Murphy's affidavit that the material sought is necessary for the determination of the federal tax liabilities of Good Hope for the years in question, I hold that there has been a sufficient showing that the subpoena was issued pursuant to a legitimate purpose. See e.g. United States v. Marine Midland Bank, 585 F.2d 36, 38 (2d Cir. 1978).

(2) Respondent's strongest argument rests upon the second prong of *Powell*—the requirement of relevancy. As an initial matter, I do not understand the respondent to resist on relevancy grounds production of material actually employed in determination of income and in tax preparation. Respondent's Brief at 9. However, they strenuously urge that Audit Work Programs, Tax Accrual Workpapers, and Tax Planning and Consulting Papers fall into a different category and are not relevant. Respondent's Brief at 10. The gist of their argument is that such materials are not "factual," in that they do not form a basis for preparation of tax returns. Respondent's Brief at 6-29.

In reliance upon *United States* v. *Coopers & Lybrand,* 413 F.Supp. 942 (D. Colo.), *aff'd* 550 F.2d 615 (10th Cir. 1977), respondents consequently argue that the government has failed to establish the relevance of the contested documents to its investigation. I am not inclined to adopt the reasoning of *Coopers & Lybrand.*

I rely upon a close reading of §7602 to determine that the summoned documents are both relevant and reachable. In furtherance of a legitimate purpose, there is authority to summon "*any* . . . person . . . to produce such books, papers, records and other data as *may be relevant or material* to such inquiry." 26 U.S.C. §7602(2). This expansive language invites,

---

Footnote continued from previous page.

issuance of the summons, were intended to permit the commissioner to make timely assessments before the running of the statute of limitations for assessments. Petitioner's Post-Hearing Memorandum at 3. With respect to this, I note that the Supreme Court has recognized that "the right to and obligation of the parties became fixed when the summons was issued. . . . " *Couch* v. *United States,* 409 U.S. 322, 329 n.9.

and has generally been accorded, a liberal construction. *United States* v. *Bisceglia,* supra at 149; see also *United States* v. *Continental Bank & Trust,* 503 F.2d 45, 50 (10th Cir. 1974); *United States* v. *Humble Oil & Refining Co.,* 488 F.2d 953, 958, and cases cited at 958, n. 11 therein (5th Cir. 1974) vacated 421 U.S. 943 (1975).

It is true that some of the cases cited to me by respondents have made use in tax preparation the touchstone of relevancy. *See United States* v. *Smith,* 373 F. Supp. 14 (1974); *United States* v. *Coopers & Lybrand, supra.* Nevertheless, I do not find that such a result is compelled by the statutory language.

The commonly articulated interpretation of "may be relevant" turns upon "whether the inspection sought might have thrown light upon the correctness of the taxpayer's return." *Foster* v. *United States,* 265 F.2d 183, 187 (2d Cir. 1959), *cert. denied,* 360 U.S. 912 (1960); *see also United States* v. *Harrington,* 388 F.2d 520, 523 (2d Cir. 1968); *United States* v. *Matras,* 487 F.2d 1271, 1274 (8th Cir. 1973); *United States* v. *Noall,* 587 F.2d 123, 125 (2d Cir. 1978) (appeal pending). Subsequent cases have reflected a refinement of "might" expressed in terms of whether there is, in the particular circumstance, "an indication of a realistic expectation rather than an idle hope that something may be discovered" *United States* v. *Harrington, supra,* at 524; accord *United States* v. *Matras, supra* at 1274. The summons was prepared by Special Agent Murphy in cooperation with another Special Agent and two Revenue agents. The Revenue agents had been conducting an examination of Good Hope books and records for some time before Special Agent Murphy entered the case. Transcript at 39, 65-66. I find that the collective familiarity of the agents involved in the joint investigation as to Good Hope records will suffice to establish a "realistic expectation" of relevancy. It is clear that expection need not rise to the level of probable cause in order to justify examination. *United States* v. *Powell, supra* at 51; *United States* v. *Acker,* 325 F.Supp. 857, 862 (S.D.N.Y.

1971). Special Agent Murphy does not, nor does he need to guarantee relevance in fact in order to satisfy the requirement that the summoned documents "may be relevant." *See United States* v. *Acker, supra.*

Respondents have urged, on the authority of *United States* v. *Matras, supra,* that relevancy "connotes and encompasses more than 'convenience'." *Id.* at 1275. While this may be true, *Matras* is readily distinguished from the case at hand. In *Matras,* IRS sought budget proposals as a "roadmap" for their investigation; the court properly noted that it was not the proposals but the actual budgets as implemented that had tax consequences. Where, as here, procedures and systems of analysis were applied directly to actual transactions, they are clearly more than "convenient" or a "roadmap" for the joint investigation. Indeed, such evidence of knowledge or potential discrepancies appears to go directly to the heart of determining whether there has been civil or criminal fraud.[8]

There is, in fact, broad support for the position that relevancy does not turn on whether the summoned material was used in preparing tax returns. *See e.g. United States* v. *Noall, supra* (audit reports and related workpapers) *United States* v. *Shlom,* 420 F.2d 263 (2d Cir. 1969 *cert. denied* 397 U.S. 1074 (1970) (record of receipts, kept for sales monitoring purposes); *United States* v. *Acker, supra* (full minutes of board meetings). I am of the opinion that the results in this set of cases better reflect a liberal interpretation of §7602. The decision in *Noall* is instructive on this point. The Court there initially emphasized that the statutory language is "may be relevant," denoting a law threshold of relevancy. *United States* v. *Noall, supra* at 125. In the final analysis, the determination of relevancy in fact

[8] In the course of testimony, a witness for Arthur Andersen conceded that the three contested categories of documents might indeed contain factual discussion of the taxpayer's status. Transcript at 112. Inasmuch as the witness was not personally familiar with the Good Hope files, I do not rely upon this admission in reaching my decision.

must be deferred until the documents are produced and analyzed. While the audit reports found relevant in *Noall* are not at issue here, the underlying rationale for ordering production is particularly persuasive. As expressed by that Court, the "Commissioner's interest lies in whether the tax returns correctly reflected . . . . income, not simply whether there were correctly prepared from the books of accounts and other records used."

United States v. *Noall, supra* at 126. On the facts of this case I am satisfied that the information sought "may be" relevant to the investigation, and that *Powell* is satisfied.

(3) The third prong of *Powell* requires that the material sought not already be in the possession of IRS. As to the Audit Work Programs, Tax Accrual Workpapers, and Tax Planning and Consulting Papers, IRS clearly does not already have possession. As to the balance of the summoned materials, Good Hope argues that over the course of the two-year IRS audit, the Service acquired possession of "the information contained in the summonsed documents"[9] Intervenor's Brief at 17. However, I am persuaded that Good Hope misstates the relevant standard. Section 7602 refers in clear terms to "books, papers, records or other data," and not to copies thereof. The Service is entitled to verify the accuracy of the questioned returns by reference to the original material, and does not have to prove error or tampering before it may have the originals. *See United States* v. *Davey,* 543 F.2d 996, 1001 (2d Cir. 1976).

I do not understand Arthur Andersen and Good Hope to argue that IRS holds any significant part of the 55 linear feet of Good Hope records in Arthur Andersen's Hartford office alone. Special Agent Murphy estimates that IRS holds only three or four file binders containing copies of original records—many of which are illegible. Transcript at 68. Consequently, I hold that

[9] In support of their position, Good Hope notes that IRS prepared a 557-page report summarizing the results of the audit.

production of the summoned documents will not violate the third prong of *Powell.*

(4) Arthur Andersen and Good Hope do not seriously argue that IRS has violated the fourth prong of *Powell.* Good Hope does not argue that IRS has gone beyond the usual procedure suggested by §§4024 *et. seq.* of the IRS manual, (Intervenor's Brief at 15), but the test is clearly whether the IRS has followed the administrative steps required by the Code. *United States* v. *Powell, supra* at 57.

MISCELLANEOUS ISSUES

Good Hope alleges that the breadth of the summons constitutes an unreasonable search and seizure within the meaning of the Fourth Amendment. Intervenor's Brief at 17. The mere fact that the summons encompasses a large volume of relevant materials does not render it unreasonable. The applicable files are clearly identified. I will not bar discovery on these grounds.

Both Arthur Andersen and Good Hope offer what seems to be a Fifth Amendment objection to the taking of their property by summons. Good Hope's claim that the government should share part of the original cost of preparing the documents (some $2,000,000) before it may examine them is patently frivolous, and I reject it. Arthur Andersen additionally claims, through counsel, that the estimated cost of compliance is in excess of $125,000. Transcript at 31. While that sum is large, there is no evidence that it is unreasonable in the course of Arthur Andersen's business. Moreover, as an incident of Arthur Andersen's duty to cooperate with a lawful summons there is a concommitant duty to "shoulder the financial burden of cooperation." *United States* v. *Dauphin Deposit Trust Co.,* 385 F.2d 129, 130 (3d Cir. 1967) *cert. denied* 390 U.S. 921 (1968); see also *United States* v. *Continental Bank & Trust Co.,* 503 F.2d 45, 48 and cases cited therein (10th Cir. 1974). On the facts, I do not find that the cost to Arthur Andersen "exceeds that

which respondent may reasonably be expected to bear as a cost of doing business," *see United States v. Freidman,* 532 F.2d 928, 938 (3d Cir. 1976), absent a showing that the same material could be produced in a significantly less expensive manner. *See United States v. Friedman, supra; United States v. Dauphin Deposit Trust Co., supra.*

Arthur Andersen further argues that some of the files are the subject of continuing work, (Respondent's Brief at 30), and that those ordered to be produced should be examined in Hartford. Absent a showing of what percentage of files are currently active, respondent has not established that it would be unduly onerous to copy such files and make the originals available to IRS. Similarly, there has been no showing that production of the documents will work a hardship on the bankruptcy proceedings. I, therefore, reject this argument.

During the course of this litigaton, Good Hope secured an order directing certain IRS agents involved in this investigation to appear for depositions with certain documents. The government seeks an order enjoining such discovery. Had Good Hope initially sought discovery in the course of this enforcement proceeding, it would have first been required to present evidence showing that enforcement of the summons would constitute an abuse of the District Court's process. On the basis of the evidence presented, and of Special Agent Murphy's testimony, I would have found no such showing. Consequently, on the authority of *United States v. Salter,* 432 F.2d 697 (1st Cir. 1970), I would have denied Good Hope discovery as against IRS. The government alleges that Good Hope has sought to circumvent this Court to improperly secure a discovery order from the Bankruptcy Court. On the facts presently before me, I am unable to conclude that the discovery order is irrelevant to any legitimate purpose of the Bankruptcy Court, and so I decline to interfere with that Court's jurisdiction. Petitioner's motion for an Order enjoining Discovery is denied.

CONCLUSION

For the above stated reasons, the Petition to Enforce Internal Revenue Summons is allowed, and the summons shall be enforced according to its original terms. Petitioner's Motion for Order Enjoining Discovery is denied without prejudice.

An appropriate order will issue.

_____

United States District Judge

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 79-1405

UNITED STATES OF AMERICA, et al.,

PETITIONERS, APPELLEES,

v.

ARTHUR ANDERSEN & CO.,

RESPONDENT, APPELLEE,

and

GOOD HOPE INDUSTRIES, INC.,

INTERVENOR, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. FRANK H. FREEDMAN, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL and BOWNES, *Circuit Judges*.

Chester M. Howe, *John M. Conley*, and *Gaston Snow & Ely Bartlett* on brief for appellant.

M. Carr Ferguson, Assistant Attorney General. *Edward F. Harrington*, United States Attorney, *Gilbert E. Andrews*, *Robert E. Lindsay*, and *Carlton D. Powell*, Attorneys, Tax Division, Department of Justice, on brief for The United States of America and Francis V. Murphy, appellees.

June 16, 1980

COFFIN, *Chief Judge*. This is an appeal arising out of an effort by petitioner Internal Revenue Service to enforce a summons under 26 U.S.C. § 7602. The summons, issued in the course of a tax investigation of intervenor Good Hope Industries, Inc., ordered Good Hope's accounting firm, respondent Arthur Andersen & Co., to produce certain "tax accrual workpapers"[1] and to testify concerning them. Both intervenor

[1] For discussion of the nature of tax accrual workpapers, see *United States v. Arthur Andersen & Co.*, No. 79-1411, slip op. at 3 n. 2 (1st Cir. Mar. 31, 1980).

and respondent appealed from a district court judgment allowing the petition to enforce summons. After failing to obtain a stay of enforcement pending appeal from the district court, ourselves, and the Circuit Justice, Andersen complied with the summons. Because all of the contested workpapers had been produced, we dismissed Andersen's appeal as moot. *United States* v. *Arthur Andersen & Co.*, No. 79-1411 (1st Cir. Mar. 31, 1980). This appeal by Good Hope escaped mootness by reason of preserving the question whether that part of the summons as yet unexecuted, commanding Andersen's testimony concerning the tax accrual workpapers, should have been enforced.

Good Hope raises four issues. The first, and most intricately woven, contention requires that one additional set of facts be noted. At the time the summons was issued, November 14, 1977, Good Hope was operating as a debtor-in-possession under Chapter XI of the Bankruptcy Act. Subsequently, in the spring of 1978, the IRS assessed taxes, penalties and interest against Good Hope and its subsidiaries and filed a proof of claim for the taxes (excluding penalties and interest) in the district court. The adjudication of these taxes is now before the bankruptcy court.

Good Hope argues that IRS, at the time the summons was issued, had lost all its section 7602 summonsing power and that the government, now capable of acting only through the Department of Justice, is confined in its discovery efforts to procedures under the Bankruptcy Rules. IRS may remain, according to Good Hope, only "an interested observer in the Bankruptcy proceeding". The fabric of the argument consists of the following strands: (1) Under 11 U.S.C. § 11(a)(2A), the bankruptcy court had the power to "determine any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed". (2) Under 26 U.S.C. § 7122, when a matter is referred to the Department of Justice for prosecution or defense,

as were the claims for Good Hope's taxes here, only the Attorney General or his delegate may compromise any such case. (3) 26 U.S.C. § 6871(a), providing for immediate assessment upon adjudication of bankruptcy, entirely supercedes normal IRS assessment procedures; IRS, having exercised its assessment authority,[2] has lost any power to make further assessments. (4) Since the Department of Justice has available all the discovery procedures of Part VII of the Rules of Bankruptcy Procedure, it may not supplement them by using § 7602, since to do so would subject Good Hope to "unnecessary examination" in violation of 26 U.S.C. § 7605(b).

Interestingly enough, perhaps significantly, Good Hope has been unable to locate any cases dealing with the authority or lack of authority of IRS to enforce a section 7602 summons after the taxpayer is within bankruptcy court jurisdiction. We note the comprehensive scope and unambiguous tone of section 7602[3] and conclude that its reach and strength are not

---

[2] The fact that an assessment has been made does not, of course, bar a supplemental assessment if a prior one is "imperfect or incomplete". 26 U.S.C. § 6204.

[3] 26 U.S.C. § 7602 provides:

"For the purpose of ascertaining the corectness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability of law or in equity of any transferee if fiduciary at any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized-

(1) To examine any books, papers, records, or other data which may be relevent or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevent or material to such inquiry; and

lightly to be reduced. In the absence of any direct limitation in the statutory language, we look for such an obvious conflict between the exercise of authority under section 7602 by IRS, under 11 U.S.C. § (11)(a)(2A) and 26 U.S.C. § 6871(a) by the bankruptcy court, and under 26 U.S.C. § 7122 by the Department of Justice as to compel a limiting interpretation of section 7602.

As far as the authority of the bankruptcy court to "determine" tax questions is concerned, the authorities cited by Good Hope, such as *Sharpe* v. *Commissioner*, 69 T.C. 19 (1977), and *Tatum* v. *Commissioner*, 69 T.C. 81 (1977), merely recognize a lack of jurisdiction in the Tax Court to decide tax questions when a petition in bankruptcy preceded the filing of a petition for redetermination of deficiencies in the Tax Court. Such jurisdictional holdings say nothing about the power of the IRS to continue an investigation preparatory to the making of an assessment by the Commissioner of Internal Revenue. In fact, assessments were made in both *Sharpe* and *Tatum* after the filing of petitions in the bankruptcy court.[4]

Similarly, we find no basis for inferring that because only the Attorney General may compromise a case that has been referred to the Department of Justice, such as referral ter-

---

(3) To take such testimony of the person concerned, under oath, as may be relevent or material to such inquiry."

For further indicia of the sweep of authority given the Secretary of the Treasury, see 26 U.S.C. §§ 6201, 6204, 7601, 7801.

[4] Good Hope, as we have noted, has made the argument that normal IRS assessment procedures are "entirely superceded" by 26 U.S.C. § 6871(a), providing for immediate assessments of deficiencies upon adjudication in bankruptcy. Good Hope, for some reason beyond our ken, would have us overlook the qualifying clause, "despite the restrictions imposed by section 6213(a) upon assessments". The latter section establishes a time period following notice of deficiency that must elapse before an assessment may be made. Section 6871(a) simply removes this requirement in bankruptcy cases, and instead mandates immediate assessment of any deficiency that has been determined but has not been assessed at the time of adjudication of bankruptcy. *Cohen* v. *Gross*, 316 F.2d 521, 522-23 (3d Cir. 1963).

minates IRS investigating authority. Indeed, the Court in *United States* v. *LaSalle National Bank*, 437 U.S. 298, 312 (1978), addressing an IRS referral to the Department of Justice for criminal prosecution, recognized that "[i]nteragency cooperation on the calculation of the civil liability is then to be expected and probably encourages efficient settlement of the dispute". In such a circumstance, however, the Court found that policies against judicial broadening of criminal discovery and infringement of the role of the grand jury mandated a "prophylactic restraint on the use of the summons". *Id.* at 313. In the context of proceedings before the bankruptcy court, on the other hand, there is no policy consideration that suggests any need for curtailment of the interagency cooperation between IRS and the Department of Justice.

Good Hope has advanced the proposition that because the Department of Justice will have recourse to available bankruptcy discovery procedures, IRS resort to section 7602 should be barred. Its citation of *United States* v. *Kulukundis*, 329 F.2d 197 (2d Cir. 1964), is inapposite. A district court in a civil action had barred a summons inquiry into tax liability on the ground that it circumvented normal discovery under the federal rules of civil procedure. Although this issue was not before the court of appeals, the government not having appealed, Judge Friendly noted that the court did not wish to be associated with the view of the district judge. *Id.* at 199.[5] Good Hope's parallel invocation of 26 U.S.C. § 7605(b), barring "unnecessary examination", is not helpful. That section simply requires notification to the taxpayer before an additional

[5] Indeed, the court went further and, after noting the possible reasonableness of barring summary methods of discovery in the preparation of criminal cases, said,"[I]t would be a quite different matter for the courts to construct a condition whereby the Government's bringing a civil suit rather than relying solely on summary methods of tax collection would deprive it of a remedy which the letter of the Code assuredly gives — particularly when Congress, in § 7605(b), prescribed such provisions for the protection of taxpayers as it wished to make." 329 F.2d at 199.

inspection for a taxable year is undertaken. Here, there has not yet been any inspection of the sort requested, i.e., testimony, and even this is addressed not to the taxpayer but to a third party.

Not only do we see no statutory or case authority supporting the proposition that IRS loses its authority to investigate under a summons simply because an investigatee has come within the jurisdiction of a bankruptcy court, but we discern no supporting reasons of policy. In this case, for instance, we would see deep-seated administrative problems were IRS to be stopped in its tracks. The assessments for the years in question were made apparently to forestall the running of the limitations period; reassessments, down or up, may yet be called for;[6] no determination of deficiency has been made for 1976; the possibility of civil penalties[7] and criminal prosecution remains; some, but not all, of Good Hope's subsidiaries being examined are before the bankruptcy court. We cannot see anything but confusion, delay, and inefficiency resulting from such an enforced bifurcation of investigatory activities. Indeed, were the proposition to be valid, we could envisage asylum sorties into bankruptcy whenever the IRS chase became too hot.

We therefore hold that IRS did have authority to seek enforcement of the summons. This holding also goes far toward resolving Good Hope's second claim — that the summons is unenforceable because it was issued solely in aid of an ongoing criminal investigation. Special Agent Murphy testified before the district court that at no time had there been a recommendation for criminal prosecution by IRS to the Department of Justice. The investigation was a joint one, potentially leading to both civil and criminal sanctions. Nor had the civil portion

[6] Although IRS may not seek redetermination in the Tax Court, it may petition the bankruptcy court to redetermine any deficiency already assessed. *See Cohen* v. *Gross*, *supra*, 316 F.2d at 522.

[7] Such a matter, though civil, might well not have been within bankruptcy court jurisdiction under the applicable law. *Sowers* v. *State Bd. of Equalization*, 600 F.2d 1254 (9th Cir. 1979).

of the investigation come to an end: not all years had been completely investigated; those assessments which had been made to protect against the running of the limitations period might be reopened; and proofs of claim could be modified. As the court said in *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 316, "[T]hose opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service. . . .Without doubt, this burden is a heavy one."

As one commentator has summarized the law after *LaSalle*, "It seems that the institutional good faith requirement can be failed only where the decision to proceed criminally has been made at the final layer of review with the agency." Note, *Developments in the Law — Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227, 1326 (1979). Here, so far as the record shows, no decision to proceed criminally has been made at any level. The only basis for Good Hope's bad faith argument is that IRS "has ceded all of its authority to compromise, litigate or otherwise determine Good Hope's civil tax liability to the Department of Justice." That this argument is groundless was the effect of our earlier holding.

A third argument, quickly disposed of, is that despite *Couch* v. *United States*, 409 U.S. 322 (1972), we ought to accord a limited privilege to tax accrual workpapers since they are exchanged with the expectation of confidential treatment much as are disclosures to an attorney. In *Couch*, the Court observed that no federal court has recognized an accountant-client privilege. The Court declined to create such a privilege "where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required by an income tax return." *Id.* at 355. Good Hope, citing Justice Brennan's concurrence stating that the Court was not expressing a *per se* rule, argues that unlike the taxpayer in *Couch*, it had an expectation in this case that its

disclosure to Andersen would be kept inviolate. Despite this proferred distinction, our reading of the Court's opinion in *Couch* reveals nothing that mandates departing from the general rule to apply a privilege in this case.

This brings us to Good Hope's last claim, that the summons does not meet the requirement of section 7602(3) that the requested testimony relating to tax accrual workpapers "may be relevant" to ascertaining the correctness of its return or determining its liability for any internal revenue tax. *See United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Tax accrual workpapers are used by accountants in attempting to determine whether financial statements give a fair picture of the company's financial position. The specific objective is to obtain a figure representing the income tax properly attributable to all items of income and expense for a given year and an accrued balance to cover the estimated tax liabilities as of the balance sheet date. To arrive at this objective requires accountant and client to review tax-impacting facts, assumptions, and decisions to see what is the maximum or "worst-case" exposure to tax liability, what is a realistic reserve figure to accrue, and whether any tax contingency is so significant as to warrant disclosure to the public. While such papers are said to constitute no part of the tax return or its workpapers, they would seem to indicate the thinking of accounting analysts and policy makers about tax decisions as to which the pros and cons may be in near balance, and thus indicate soft spots where IRS could profitably probe.

The importance of the interests of all concerned — taxpayers, accountants, and IRS — is clear. That a resolution sensitively reflecting the legitimate interests of all and faithful to applicable statutes would involve the most delicate and demanding analysis of facts, research of law, and reflection on policy is equally clear. Precisely because we view the issue of "relevance" as so significant, we find this case in a poor posture to serve as the matrix for a precedent. The tax accrual

workpapers have been produced. All confidential exchanges contained therein are public property. While no specific request for testimony has been made and no questions framed, it seems to us that there are three possibilities. First, the government, having obtained the workpapers in this case, may have received enough information for its purposes or may conclude that the prospect of obtaining any additional information through questioning is not worth the trouble. Second, any questioning in this case might well be confined to explaining or clarifying information already revealed, and, since the basic documents are known to counsel, the relevance (or irrelevance) of the proposed questioning may be obvious. Finally, it is possible that the government may want to follow leads suggested by the workpapers by questioning Andersen employees on sensitive areas, deeming the risk of further delay worth taking. In such a case, were the questioning to be resisted and the issue brought before us, we would then have a concrete record to deal with.

We therefore hold as to this issue that because of the production of the records to which any questioning under the summons would relate, any decision regarding the possible relevance of such questioning under 26 U.S.C. § 7602 would be premature.

The district court's order enforcing the summons is affirmed.

Adm. Office, U.S. Courts — Blanchard Press, Inc., Boston, Mass.

APPENDIX D

No. 79-1411.

UNITED STATES OF AMERICA, ET AL.,
Petitioners, Appellees,

v.

ARTHUR ANDERSEN & CO.,
Respondent, Appellant,

and

GOOD HOPE INDUSTRIES,
Intervenor, Appellee.

JUDGMENT

Entered: March 31, 1980

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The appeal is dismissed as moot.

By the Court:

[illegible] GALLUP
Clerk.

[cc: Messrs. Hickman, Powell, and Bialkin]

APPENDIX E

Supreme Court of the United States

No. A-1102

ARTHUR ANDERSEN & CO.,

Petitioner,

v.

UNITED STATES, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 28, , 19 80.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 16
day of June, 19 80.

APPENDIX F

Section 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax . . ., or collecting any such liability, the Secretary is authorized

(1) To examine any book, papers, records or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax . . ., or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax . . ., or any other person the Secretary may deem proper, to appear before the Secretary . . . and to produce such books, papers, records or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7604. Enforcement of summons

(a) Jurisdiction of the district court.

If any person is summoned under the internal revenue laws to appear, to testify or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records or other data.

(b) Enforcement.

Whenever any person summoned under section . . . 7602 neglects or refuses to obey such summons or to

produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court . . . for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge . . . to hear the application and, if satisfactory proof is made, to issue an attachment . . . for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge . . . shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

APPENDIX G

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA AND
FRANCIS W. MURPHY, SPECIAL AGENT
INTERNAL REVENUE SERVICE,

Petitioners,

v.

CIVIL ACTION
NO. 78-3227-F

ARTHUR ANDERSEN & COMPANY
Respondent,

AND

GOOD HOPE INDUSTRIES, INC.,
Intervenor

APPLICATION FOR STAY PENDING APPEAL

Pursuant to Rule 62 (d) of the Federal Rules of Civil Procedure, intervenor Good Hope Industries, Inc., respectfully requests that the Court stay enforcement of its Order of July 23, 1979 pending appeal to the Court of Appeals for the First Circuit. In support of its request, intervenor submits that its right of appeal would be effectively denied if a stay were not granted, and that Rule 62 (d) appears to contemplate the allowance of such a stay as a matter of course upon filing of a bond. Intervenor further represents that Steven I. Kaplan, Esquire, counsel for the United States, has stipulated that no bond need be filed by the intervenor-appellant.

8-8-79
Court sees low merit to the intervenor's application for stay in that the government's investigative procedure would simply be frustrated during such period of a stay. Hence, the application for a stay is denied & ordered.
R 200
Andrew T.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1411

UNITED STATES OF AMERICA, ET AL.,
Petitioners, Appellees,

v.

ARTHUR ANDERSEN & COMPANY,
Respondent, Appellant,

and

GOOD HOPE INDUSTRIES, INC.,
Intervenor, Appellee.

MEMORANDUM AND ORDER

Entered August 17, 1979

This matter is before us on respondent's motion for a stay pending its appeal of the district court's order enforcing an administrative summons issued by the Internal Revenue Service.

Upon consideration of respondent's filings and the district court's extensive Memorandum of July 23, 1979, the motion for stay pending appeal is denied.

By the Court:

/s/ [illegible]

Clerk.

(Cert. c., Clerk, U.S.D.C., Mass. cc: Messrs. Howe, Kaplan, and Murphy and Ms. Brennan.)

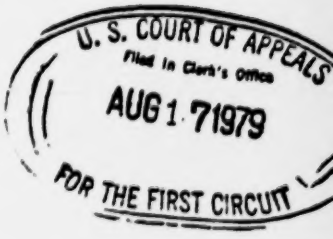
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1405

UNITED STATES OF AMERICA, ET AL.,
Petitioners, Appellees

v.

ARTHUR ANDERSEN & COMPANY,
Respondent, Appellee,



GOOD HOPE INDUSTRIES, INC.,
Intervenor, Appellant.

MEMORANDUM AND ORDER

Entered August 17, 1979

Intervenor seeks to stay pending appeal the July 23, 1979 Order of the district court enforcing an Internal Revenue Service administrative summons on alternative theories: (1) that the district court erred in not granting an automatic stay under Rule 62(d), Federal Rules of Civil Procedure, and (2) that "[t]his Court should rectify the district court's arbitrary and unjustifiable nullification of Rule 62(d)" by staying the enforcement order pursuant to Rule 8(a), Federal Rules of Appellate Procedure.

Upon consideration of intervenor's motion for stay and its supporting memorandum, the petitioners' opposition and the extensive Memorandum of the district court, we deny the motion for stay pending appeal. Intervenor has failed to convince us that Rule 62(d) applies to a district

court's order in a summons enforcement proceeding. Nor has intervenor demonstrated a sufficient likelihood of success on appeal or explained the irreparable injury it will suffer by enforcement of the summons. See United States v. Lyons 442 F.2d 1144, 1145, (1st Cir. 1971).

By the Court:

/s/ DANA H. GALLUP

Clerk.

[Cert. c., Clerk, U.S.D.C., Mass.; cc: Messrs. Howe, Kaplan and Murphy and Ms. Brennan.]

APPENDIX H

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

August 21, 1979

Chester M. Howe, Esquire
Gaston Snow & Ely Bartlett
One Federal Street
Boston, Massachusetts 02110

Re: Arthur Andersen & Co., et al. v.
United States, et al., A-158

Dear Mr. Howe:

Your application for stay in the above-entitled case has been presented to Mr. Justice Brennan, who has endorsed thereon the following:

"Denied
8/20/79
Wm. J. Brennan, Jr."

Very truly yours,

MICHAEL RODAK, JR., Clerk

By

Patricia A. Dean
Assistant Clerk

th

cc: Hon. Wade H. McCree, Jr.
Solicitor General of the United States

J. Read Murphy, Esquire
Murtaha, Cullina, Richter & Pinney
101 Pearl Street, P.O. Box 3197
Hartford, Connecticut 06103

Appendix I

Internal Revenue Manual
Accountants' Workpapers

4024.1 (6-12-80)
Definitions and Scope

(1) The term "audit workpapers," as used in this subsection, means workpapers kept by the independent accountant of the procedures followed, the tests performed, the information obtained, and the conclusions reached pertinent to his/her examination. Workpapers may include work programs, analyses, memoranda, letters of confirmation and representation, abstracts of company documents, and schedules or commentaries prepared or obtained by the auditor. These workpapers provide an important support for the independent certified public accountant's opinion on the fairness of the presentation of the financial statements, including the representation as to compliance with the generally accepted auditing standards. (See Sections 338.02 and .03 of the Statements on Auditing Standards, as issued by the American Institute of Certified Public Accountants).

(2) The term "tax workpapers," as used in this subsection, means workpapers used in assembling and compiling financial data preparatory to placing it on a tax return. They include information used to trace financial information to the tax return.

(3) The provisions of this subsection do not apply to in cases under joint investigation with the Criminal Investigation Division.

* * *

4024.3 (6-12-80)
Guidelines for Requesting Tax Accrual Workpapers in Corporate Examinations

(1) The term tax accrual workpapers, as used in this subsection, sometimes is also referred to as the Tax Pool Analysis or the Tax Liability Contingency Analysis.

(a) Tax accrual workpapers could consist of two or three basic documents.

1 A summary analysis of the transactions recorded in the taxpayer's general ledger with respect to income tax accounts;

2 A computation of the tax provisions for the current year, whether or not the tax is payable in that year; and

3 A memorandum discussing items reflected in the financial statements as income or expense where the ultimate tax treatment is unclear. (See footnote 6, *U.S. v. Arthur Andersen and Company,* 79-2 USTC 9506 (D. Mass.)).

(b) Guidelines for the reconciliation of the Tax Accrual are contained in 520.47 of IRM 4233, Tax Audit Guidelines, Individuals, Partnerships, Estates and Trusts and Corporations.

(2) As stated in IRM 4024.2:(2), "the taxpayer's records are the primary source of information." When requesting information pertaining to the tax accrual, the examiner should first exhaust all reasonable means to secure this information from the corporate officer before looking to the independent auditor to provide the information. In many instances this will require the examiner to question or summons a financial officer or the tax manager of the corporation concerning the knowledge of the items that make up the corporation's contingent reserve accounts. This also includes the issuance of a summons to the corporate officer under IRC 7602(3).

Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 80-311

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARTHUR ANDERSEN & CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

American Book Co. v. *Kansas*, 193 U.S. 49 3

Attorney General of United States, In re, 596 F. 2d 58, cert. denied, 444 U.S. 903 .....

Brownlow v. *Schwartz*, 261 U.S. 216 ..... 3, 4

Cobbledick v. *United States*, 309 U.S. 323 4

Couch v. *United States*, 409 U.S. 322 5

DeFunis v. *Odegaard*, 416 U.S. 312 4

Doe v. *Bolton*, 410 U.S. 179 3

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 6

Grand Jury Subpoena, May, 1978 at Baltimore, In re, 596 F. 2d 630 4

Great Western Sugar Co. v. *Nelson*, 442 U.S. 92 .....

Hickman v. *Taylor*, 329 U.S. 495 5

Kurshan v. *Riley*, 484 F. 2d 952 2

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539...3, 6

North Carolina v. *Rice*, 404 U.S. 244 2

Perlman v. *United States*, 247 U.S. 7 7

Preiser v. *Newkirk*, 422 U.S. 395 2

Roe v. *Wade*, 410 U.S. 113 3

SEC v. *Laird*, 598 F. 2d 1162 3

Southern Pac. Terminal Co. v. *ICC*, 219 U.S. 498 3

Page

Cases—Continued:

Special April 1977 Jury, In re, 581 F. 2d 589 6

United States v. *Coopers & Lybrand*, 550 F. 2d 615 6

United States v. *Deak-Perera Banking Corp.*, 610 F. 2d 89 2

United States v. *Friedman*, 532 F. 2d 928 3

United States v. *Frumento*, 552 F. 2d 534 3

United States v. *Hankins*, 565 F. 2d 1344 2

United States v. *New York Telephone Co.*, 434 U.S. 159 3

United States v. *Nixon*, 418 U.S. 683 4

United States v. *Olson*, 604 F. 2d 29 3

United States Parole Commission v. *Geraghty*, No. 78-572 (Mar. 19, 1980) 3

United States v. *Patmon*, No. 75-2246 (6th Cir. Sept. 16, 1980) 3

United States v. *Ryan*, 402 U.S. 530 ..... 4, 5

United States, In re, 610 F. 2d 1148 3

United States, In re, 616 F. 2d 1122 3

Vesco v. *SEC*, 462 F. 2d 1350 4

Weinstein v. *Bradford*, 423 U.S. 147 3

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-311

ARTHUR ANDERSEN & CO., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the court of appeals' dismissal of its appeal from an order of the district court enforcing an Internal Revenue summons on the ground that the case became moot upon petitioner's compliance with the summons.

The pertinent facts may be summarized as follows: On November 14, 1977, a special agent of the Internal Revenue Service issued a summons to petitioner requesting production of records pertaining to the tax liabilities of Good Hope Industries, Inc. Petitioner refused to produce certain documents referred to collectively as the "tax accrual work papers" (Pet. App. A-10 to A-12, A-18). These documents were prepared by petitioner to evaluate Good Hope's reserve for taxes, and contingent liability account shown on its balance sheet (Pet. App. A-3). The

district court ordered the summons enforced[1] and refused to stay its order pending appeal (Pet. App. A-28, A-42). Both petitioner and Good Hope filed notices of appeal and moved to stay the order pending appeal. The court of appeals denied a request for a stay (Pet. App. A-43 to A-44). Subsequently, Mr. Justice Brennan likewise denied Good Hope's motion for a stay (Pet. App. A-46). Petitioner thereupon complied with the summons at issue by producing the requested documents. The Service made copies and returned the originals to petitioner (Pet. App. A-3). In light of petitioner's compliance with the summons, the court of appeals dismissed petitioner's appeal upon the ground that the case was moot (Pet. App. A-8 to A-9).

1. Petitioner contends (Pet. 7-9) that the court of appeals erred in dismissing its appeal as moot even though it removed the only issue in the case by complying with the summons. But as this Court recently observed, "a federal court has neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them.' " *Preiser* v. *Newkirk*, 422 U.S. 395, 402 (1975), quoting *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Here, the petition to enforce the summons sought petitioner's production of certain documents. Pursuant to the order of the district court, those documents have been produced. Accordingly, the court below correctly held that there is no longer a live dispute between petitioner and the government and that the case is moot. *United States* v. *Deak-Perera Banking Corp.*, 610 F. 2d 89 (2d Cir. 1979); *Kurshan* v. *Riley*, 484 F. 2d 952 (4th Cir. 1973); *United States* v. *Hankins*, 565 F. 2d 1344 (5th Cir. 1978); *United States* v.

---

[1] The taxpayer, Good Hope Industries, Inc., was permitted to intervene in the summons enforcement proceedings.

Patmon, No. 75-2246 (6th Cir. Sept. 16, 1980); *United States* v. *Olson*, 604 F. 2d 29 (8th Cir. 1979); *SEC* v. *Laird*, 598 F. 2d 1162 (9th Cir. 1979).

Petitioner seeks to avoid the consequence of its compliance with the summons by contending (Pet. 9) that the issue in this case is "capable of repetition, yet evading review." It therefore urges that its compliance did not render this case moot. But the line of cases relied upon by petitioner, and the amicus American Institute of Certified Public Accountants[2] turns on the fact that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975). Here, petitioner had the power to keep the dispute alive simply by not producing the documents. However, once it produced the documents, there was no longer any dispute between the parties. The case is therefore controlled by *Brownlow* v. *Schwartz*, 261 U.S. 216 (1923), where the Court held an appeal to be moot because the appellant had complied with the lower court order. See also *American Book Co.* v. *Kansas*, 193 U.S. 49, 52 (1904).[3]

---

[2]*Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498 (1911); *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976); *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977); *In re United States*, 616 F. 2d 1122 (9th Cir. 1980); *In re United States*, 610 F. 2d 1148 (3d Cir. 1979); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Doe* v. *Bolton*, 410 U.S. 179 (173); *United States* v. *Frumento*, 552 F. 2d 534, 536-541 (3d Cir. 1977) (en banc).

United States Parole Commission v. *Geraghty*, No. 78-572 (Mar. 19, 1980), upon which petitioner relies (Pet. 12), is likewise distinguishable. There, an attack upon the Commissioner's parole guidelines was not rendered moot by the plaintiff's release from confinement (an event over which he had no control) because the suit was a class action.

[3]Compare, however, *United States* v. *Friedman*, 532 F. 2d 928 (3d Cir. 1976). There, the court concluded that a summons enforcement

2. Petitioner further contends (Pet. 13) that this case is still a live controversy because it was compelled by court order to comply with the summons. As petitioner sees the matter, it should not be placed in the position of defying the district court and risking contempt in order to obtain review. But this Court rejected much the same argument in *Brownlow* v. *Schwartz*, *supra*, 261 U.S. at 218, observing that "[t]he motive of the [complying] officer * * * is quite immaterial. We are interested only in the indisputable fact that his action * * * has left nothing to litigate. The case being moot, further proceeding upon the merits can neither be had here nor in the court of first instance." Compare *DeFunis* v. *Odegaard*, 416 U.S. 312, 316-317 (1974).

Moreover, despite petitioner's argument to the contrary (Pet. 13-15), the requirement that a party risk contempt to insure that the issue does not become moot is well established. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *United States* v. *Ryan*, 402 U.S. 530 (1971); *In re Grand Jury Subpoena, May 1978 at Baltimore*, 596 F. 2d 630 (4th Cir. 1979). Indeed, in *In re Attorney General of United States*, 596 F. 2d 58, 62 (2d Cir.), cert. denied,

---

proceeding did not become moot even after compliance because a ruling by the court of appeals that the summonses were unenforceable on the ground that they were issued solely for a criminal prosecution could affect the possible use of the summoned material in any subsequent criminal or civil proceeding. While we believe that such contentions are more properly presented in whatever criminal or civil case may subsequently ensue rather than in the summons enforcement proceeding, the fact that there was "incomplete compliance with the court's order" (532 F. 2d at 931) with respect to some of the summoned evidence at issue in *Friedman* serves to distinguish that case (*ibid.*). See also *Vesco* v. *SEC*, 462 F. 2d 1350 (3d Cir. 1972), in which the Third Circuit dismissed as moot an appeal seeking to enjoin the enforcement of an SEC subpoena with which the appellant fully complied.

444 U.S. 903 (1979), the court rejected the government's argument that it would be unseemly to require the Attorney General to be bound by the traditional requirement of standing in contempt to obtain review of a court order to produce documents in his possession. There is accordingly no reason to relieve petitioner, a private accounting firm, of the traditional prerequisite for obtaining appellate review of a court order to produce accountant's workpapers which are not subject to any evidentiary privilege.[4] See *Couch* v. *United States*, 409 U.S. 322, 335 (1973).

There is no basis for petitioner's further contention (Pet. 17-18) that requiring it to resist compliance with the district court's order is an "undesirable procedure" (*id.* at 17). This case arises out of an investigation by the Internal Revenue Service of Good Hope Industries. The same policies calling "for expedition in the administration of the criminal law" that "justif[y] putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal" (*United States* v. *Ryan*, *supra*, 402 U.S. at 533) are equally applicable here. The evidence sought by the Service may or may not yield information that will result in the determination of deficiencies. The production of that evidence should not be impeded by piecemeal reviews that serve only to delay the ultimate conclusion of the tax investigation. As this Court observed in *United States* v. *Nixon*, 418 U.S. 683, 690 (1974), the requirement of

---

[4]Contrary to petitioner's argument (Pet. 26), there is no connection between this case and the work-product issue presented in *The Upjohn Co.* v. *United States*, No. 79-886 (argued Nov. 5, 1980). The work-product doctrine of *Hickman* v. *Taylor*, 329 U.S. 495 (1947), recognized a qualified privilege for certain materials prepared by an *attorney* acting for his client in anticipation of litigation.

submitting to contempt "promotes judicial efficiency and hastens the ultimate termination of litigation." The rule requiring petitioner to risk contempt likewise hastens the ultimate termination of a tax investigation by discouraging routine protracted challenges to summons enforcement orders and thereby limiting such litigation to cases where the summoned party believes that the claims are meritorious. In sum, if petitioner believes that its claim on the merits will be vindicated, it should be willing to risk the possibility of contempt to obtain review of those claims.[5]

3. Finally, contrary to petitioner's argument (Pet. 13), the decision below does not conflict with *In re Special April 1977 Grand Jury*, 581 F. 2d 589 (7th Cir. 1978). There, the court permitted a post-compliance appeal from an order enforcing grand jury subpoenas served on members of the staff of the subject of the investigation. But as the court of appeals pointed out, that case is distinguishable because the third parties directed to comply had "no strong interest in resisting the subpoenas to expose themselves to contempt by refusing to comply" (Pet. App. A-6).[6] In those circumstances, denial of

---

[5]Since petitioner's compliance with the district court's order prevented the court of appeals from reaching the merits of its claim that the tax accrual workpapers were not relevant, there is no basis for petitioner's argument (Pet. 28) that the decision below conflicts with *United States* v. *Coopers & Lybrand*, 550 F. 2d 615 (10th Cir. 1977).

[6]The Seventh Circuit in *In re Special April 1977 Grand Jury* also relied upon this Court's decisions in *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539 (1976) and *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765 (1978), stating that "the Supreme Court has not required litigants to subject themselves to contempt or criminal sanction" (581 F. 2d at 591) in order to meet the "evading review" aspect of the mootness test. But, as the court of appeals correctly noted (Pet. App. A-6 to A-7), both of those cases involved prior restraints on arguably protected speech. Here, the imposition of sanctions on petitioner for refusal to produce the summoned evidence would involve no such prior restraint upon speech.

immediate review would render impossible any review by the subject of the investigation who would be "powerless to avert the mischief of the order." *Perlman* v. *United States*, 247 U.S. 7, 13 (1918). Here, by contrast, the summons was directed at petitioner itself who has asserted that its professional functions would be impaired by disclosure (see Pet. 20). Hence, as the court of appeals correctly concluded, "to the extent that the issue sought to be reviewed is of such assertedly vital importance to both Andersen and the industry, it does not seem too draconian to insist on resort to contempt in order to preserve the issue for appeal" (Pet. App. A-8).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

DOJ-1980-11

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-311

IN THE

Supreme Court of the United States

October Term, 1980

ARTHUR ANDERSEN & COMPANY,
Petitioner,

and

UNITED STATES OF AMERICA, and FRANCIS W. MURPHY,
Special Agent, Internal Revenue Service,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF THE PETITION FOR CERTIORARI

KENNETH J. BIALKIN
LOUIS A. CRACO
HOWARD C. BUSCHMAN III

Attorneys for American Institute of Certified Public Accountants
One Citicorp Center
153 East 53rd Street
New York, New York 10022

Of Counsel
WILLKIE FARR & GALLAGHER
One Citicorp Center
153 East 53rd Street
New York, New York 10022

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
INTEREST OF THE INSTITUTE AS *Amicus Curiae*	2
STATEMENT OF THE CASE	3
The Proceedings Below	3
Tax Accrual Workpapers Defined	3
SUMMARY OF ARGUMENT	5
REASONS FOR GRANTING THE WRIT	6
I. THE DECISION BELOW HOLDING THAT THIS CASE IS MOOT CONFLICTS WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS IN THAT IRS SUMMONSES OF ACCOUNTANTS ARE CAPABLE OF REPETITION YET EVADE REVIEW; IGNORES THE MANDATE FOR FULL JUDICIAL REVIEW OF IRS SUMMONSES; AND IS SERIOUSLY INAPPROPRIATE FOR POLICY REASONS	6
1. The Issue Is Conceded to Be Capable of Repetition	7
2. Appellate Review Evaded	8
3. The Importance of the Issue Precluded a Finding of Mootness in this Case; The Holding Below to the Contrary Raised an Additional Conflict Among the Circuits	11
4. The Decision Below Disregards the Mandate of Full Judicial Review	12
5. Strong Policy Reasons Favor Application of the Capable-of-Repetition-Yet-Evading-Review Doctrine in These Circumstances	13

PAGE

II. CERTIORARI SHOULD BE GRANTED TO ENTERTAIN THE SECOND ISSUE RAISED BY THE PETITION BECAUSE OF ITS IMPORTANCE TO ADMINISTRATION OF THE TAX LAWS AND TO RESOLVE THE CONFLICT AS TO ITS RESOLUTION 14

1. The Carte Blanche Discovery of Tax Workpapers by the IRS as Sanctioned Below Sharply Impacts the Ability of Auditors to Perform and Should Not Be Permitted 15

2. The Second Issue Is the Subject of a Practical Conflict Between the First and the Tenth Circuits and Should Be Resolved 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

Carlson Companies, Inc. v. *Sperry and Hutchinson Co.*, 374 F. Supp. 1080 (D. Minn. 1974) 19 n.8

Covey Oil Co. v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965) 19 n.8

First National Bank of Boston v. *Bellotti*, 435 U.S. 765 (1978) 6 n.4

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979)..... 6 n.4, 8, 9

Hubner v. *Tucker*, 245 F.2d 35 (9th Cir. 1957) 12 n.5

In re Grand Jury Subpoena Duces Tecum, William A. Grant Jr. and Arthur Young & Co., 75 Cr. No. 139 (N.D. Okla. Oct. 6, 1975) Wall St. J., Oct. 8, 1975, at 10, col. 2 (Eastern ed.) 14 n.6

Matter of Special April 1977 Grand Jury, 581 F.2d 589 (7th Cir.), *cert. denied*, 439 U.S. 1046 (1978) 10

Moore v. *Ogilvie*, 394 U.S. 814 (1969) 6 n.4

PAGE

Nebraska Press Ass'n v. *Stuart*, 427 U.S. 539 (1976) .. 9

Reisman v. *Caplin*, 375 U.S. 440 (1964) 12-13

Roe v. *Wade*, 410 U.S. 113 (1973) 6 n.4, 9

SEC v. *Sloan*, 436 U.S. 103 (1978) 6 n.4

Southern Pacific Terminal Co. v. *ICC*, 219 U.S. 498 (1911) 6

Super Tire Engineering Co. v. *McCorkle*, 416 U.S. 115 (1974) 6 n.4

United States v. *Coopers & Lybrand*, 413 F. Supp. 942 (D. Colo. 1975), *aff'd*, 550 F.2d 615 (10th Cir. 1977) 3, *passim*

United States v. *Frumento*, 552 F.2d 534 (3d Cir. 1977) 11

United States v. *Goldman*, 453 F. Supp. 508 (C.D. Cal. 1978) 12 n.5

United States v. *Matras*, 487 F.2d 1271 (8th Cir. 1973) 12 n.5, 18

United States v. *Noall*, 587 F.2d 123 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979) 19 n.9

United States v. *Theodore*, 479 F.2d 749 (4th Cir. 1973) 12 n.5, 18-19

United States v. *Third Northwestern National Bank*, 102 F. Supp. 879 (D. Minn. 1952) 12 n.5

United States v. *Williams*, 337 F. Supp. 1114 (S.D.N.Y. 1971) 12 n.5

United States Parole Comm'n v. *Geraghty*, —— U.S. ——, 100 S.Ct. 1202, 48 U.S.L.W 4296 (March 19, 1980) 6 n.4

Weinstein v. *Bradford*, 423 U.S. 147 (1975) 6 n.4

Statutes and Rules

Internal Revenue Code of 1954, 26 U.S.C.
§ 7602 (1976) 18
§ 7604 (1976) 6, 12

Judiciary and Judicial Procedure, 28 U.S.C. § 1291 (1976) 13

Regulation S-X, 17 C.F.R. § 210.1-01 *et seq.* (1976) 4

Securities Exchange Act of 1934, 15 U.S.C. § 78 (1)(1976) 4

PAGE

Other Authorities

"A Losing Fight to Shield Company Tax Secrets", *Business Week,* 117 (June 16, 1980) 17-18

Financial Accounting Standard Board Statement No. 5 (1975) 4

Internal Revenue Manual, MT 4000-161 § 4024.1 (2) *et seq.* (6-11-79) ..... 16 & n.7, 17

Internal Revenue Manual, MT 9900-36 § 267.2 (5) (3-1-77) 7, 15-16

Internal Revenue Manual, MT 9900-36 § 267.51 (2) (3-1-77) 7, 15-16

Statement on Auditing Standards (AICPA) No. 2 (1974); No. 12 (1976); No. 17 (1977) 4

Testimony of Donald C. Alexander, Commissioner of Internal Revenue, Before the House Subcommittee on Courts, Civil Liberties and Administration of Justice, *BNA Daily Tax Report,* September 9, 1975, at J-9 17

No. 80-311

IN THE

Supreme Court of the United States

October Term, 1980

ARTHUR ANDERSEN & COMPANY,

Petitioner,

and

UNITED STATES OF AMERICA, and FRANCIS W. MURPHY, Special Agent, Internal Revenue Service,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF THE PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

This Brief is submitted by the American Institute of Certified Public Accountants (the "AICPA") as *amicus curiae,* with the consent of all parties, pursuant to Rule 36.1 of this Court.[1] The AICPA urges this Court to grant the Petition for Certiorari in order to decide both questions presented by the Petitioner.

1. Consent to the filing of this Brief has been given by the United States in the letter of the Solicitor General dated September 23, 1980, and by the Petitioner in the letter of its counsel dated September 26, 1980, each of which was filed by its author with the Clerk of this Court at the time it was sent.

INTEREST OF THE AICPA AS *AMICUS CURIAE*

The AICPA is the only national accounting association whose membership is limited to certified public accountants; it has approximately 160,000 members. Among its purposes are the promotion and maintenance of high professional standards of practice, including the development of authoritative auditing standards. The AICPA also seeks to identify, examine and address issues affecting the accounting profession as a whole.

Such issues are presented in this case. The decision of the Court of Appeals compels an auditor to stand in contempt in order to obtain appellate review of a district court order enforcing an IRS summons to obtain materials from a taxpayer's independent certified public accountant, even though the financial facts contained in the materials are otherwise available to the IRS, and even though disclosure of such materials to the IRS will have a concomitant effect of infringing on the integrity and appropriate confidentiality of the audit process.

This question transcends the issues as presented by the parties litigant; its resolution affects every auditor. As the AICPA elaborates more fully in its Argument, the combination of the apparent decision of the IRS to seek production of such papers in unexceptional cases, and the denial of appellate recourse to affected auditors except by incurring contempt, imposes truly insupportable and unjustifiable burdens on such professionals who wish to discharge their duties in a lawful and ethical manner.

The order below was founded on an incorrect perception of the applicable law, as applied to the facts of this case, and, accordingly, the AICPA urges its reversal.

STATEMENT OF THE CASE

The Proceedings Below

Arthur Andersen & Company ("Andersen") was served with a summons pursuant to 26 U.S.C. § 7602 (1976) directing it to testify and to produce for examination various records allegedly relating to the tax liabilities of one of Andersen's clients, Good Hope Industries, Inc. ("Good Hope"). It agreed to produce all documents except its tax accrual workpapers.

The United States District Court for the District of Massachusetts dismissed the objections of Andersen and of Good Hope, as intervenor, and on July 23, 1979, ordered Andersen to produce the tax accrual workpapers. In so doing, it expressly refused to follow *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977), the only authority directly on point. Andersen promptly appealed. Only after a stay of the order of enforcement was denied by the district and appellate courts and by a Justice of this Court, did Andersen produce the tax accrual workpapers.

The United States Court of Appeals for the First Circuit thereupon dismissed the appeal as moot in an opinion dated March 31, 1980. (A-1)[2] The Court held that, to preserve its right of appeal, an auditor must contemptuously disobey the district court's order requiring production.

Tax Accrual Workpapers Defined

Tax accrual workpapers contain materials gathered or prepared by an independent certified public accountant as

2. References denominated by "A" are to the Appendix annexed to the Petition for Certiorari.

part of his audit of the financial statements. Tax accrual workpapers concern only the adequacy of a client's provisions for potential tax liability. They are not used in the preparation of the client's tax returns.

Audits of public companies are required by § 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(1) (1976) and Regulation S-X, 17 C.F.R. § 210.1-01 *et seq.* (1976). Accruals for unpaid taxes are an integral component of the financial statements required to be filed by registrants with the Securities and Exchange Commission and must be analyzed by the auditor. Financial Accounting Standard Board Statement No. 5 (1975); Statements on Auditing Standards No. 2 (1974), No. 12 (1976) and No. 17 (1977).

Essentially, tax accrual workpapers reflect the accountant's evaluation of the adequacy of the client's accrual or "reserve" for income taxes in relation to the client's financial statements taken as a whole; this evaluation is based on the independent certified public accountant's analysis of the client's records and the assessment of opinions and speculative projections communicated in confidence to the auditor by the client's personnel or counsel. Such workpapers also usually contain the *auditor's* judgments as to possible tax questions, alternative treatment and positions, and similar nonfactual matter.

As in general, so here, the factual information concerning Good Hope's business transactions was derived from Good Hope's books and records, full access to which was given the IRS.[3] Notwithstanding its review of the client's books

3. *See* Affidavit of Wilbur Duncan, sworn to on March 27, 1979, at paragraphs 5-18 designated as Document 9 in Appellant's Appendix filed with the First Circuit; Transcript of Hearing, March 22, 1978 ("Transcript of Hearing"), at 100-09 designated as Document 4 in Appellant's Appendix filed with the First Circuit.

and records, the IRS was unable to specify how production of the tax accrual workpapers would aid its investigation other than by providing convenience.

SUMMARY OF ARGUMENT

The holding below that, in the absence of contemptuous non-compliance with the district court's order enforcing an IRS summons, an independent public accounting firm must forfeit its right to appeal the propriety of the order and of the summons, and the standards upon which that result was reached, raise highly disturbing inmplications concerning every independent auditor of financial statements. This inequitable result would compel auditors summoned by the IRS to divulge their opinions and the speculations of their clients or to stand in contempt merely to qualify to appeal a point of law. No such result is permitted, much less required, by the cases in this Court or in other courts which have considered analagous situations. Such an outcome would also contravene both the explicit intent of Congress in providing for meaningful judicial review of summonses issued by the IRS and compelling policy considerations which favor encouraging respect for court orders and expedition in IRS investigations.

The conceded importance of the substantive issue in this case, moreover, should have induced the court below to entertain it. By declining to examine this substantive issue, the Court of Appeals left in place a district court determination that is in conflict with the law in the other circuit which has addressed the question. Real and substantial rights are presently at stake. There is great need to resolve the tension that exists between the expedition favored by the administration of the tax laws, on the one hand, and the freedom to communicate in appropriate confidence that

is necessary for the performance of the audit function and the provision of adequate information to the investor, on the other. As a matter of law and in the interest of justice the real and live controversy which exists in this case should not be avoided, but resolved.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HOLDING THAT THIS CASE IS MOOT CONFLICTS WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS IN THAT IRS SUMMONSES OF ACCOUNTANTS ARE CAPABLE OF REPETITION YET EVADE REVIEW; IGNORES THE MANDATE FOR FULL JUDICIAL REVIEW OF IRS SUMMONSES; AND IS SERIOUSLY INAPPROPRIATE FOR POLICY REASONS.

The First Circuit, in holding that this case was mooted by Andersen's having produced the documents summoned, avoided its duty to decide cases and controversies in congressionally prescribed areas. Congress clearly vested the federal courts with jurisdiction to hear these cases, 26 U.S.C. § 7604 (1976), and the matters at issue could not be more controverted.

This case presents a classic example of an issue "capable of repetition yet evading review" which the courts have long refused to dismiss as moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911).[4] It is precisely the

4. *See also, United States Parole Comm'n* v. *Geraghty*, —— U.S. ——, 100 S.Ct. 1202, 48 U.S.L.W. 4296, 4299 (March 19, 1980); *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 108-10 (1978); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

likelihood of repetition of the present controversy which makes the instant issue one of such serious and immediate concern to the AICPA and its members, and has provoked its *amicus* participation.

1. The Issue Is Conceded to Be Capable of Repetition.

That the issue is likely to recur was conceded by the First Circuit (A-4) and that concession is supported by its actual reoccurrence. For a number of years the Federal Taxation Division of the AICPA conducted discussions with the IRS to develop guidelines pursuant to which materials would be obtained by the IRS from auditors. As a result of those negotiations, the IRS agents' manual was amended to recognize that the public accountant's workpapers should normally be used only as a collateral source and that access to them should be requested with discretion. IR Manual, MT 9900-36 §§ 267.2(5), 267.51(2) (3-1-77).

Notwithstanding these discussions, the IRS has in recent years proceeded to summon accountant's workpapers, including tax accrual workpapers, in cases in which it had not previously sought them. In 1975, the IRS sought to enforce a summons served on Coopers & Lybrand for the tax accrual workpapers and audit programs with respect to the audit of its client, Johns-Manville Corporation. The district court denied enforcement of the summons, *United States* v. *Coopers & Lybrand,* 413 F. Supp. 942 (D. Colo. 1975), and was affirmed on appeal. 550 F.2d 615 (10th Cir. 1977).

Representatives of the IRS, however, have since publicly asserted that the Tenth Circuit's decision in *Coopers & Lybrand* was wrong. Those representatives have contended that the Service has the authority to obtain accountant's workpapers, including tax accrual workpapers, and

that the Service can be expected to exercise that authority in the future. For example, in May, 1979, the then-chief counsel of the IRS, in an address to the Federal Taxation Division of the AICPA, stated that the IRS intended to seek accountant's workpapers in appropriate cases and that there was likely to be recurring litigation to enforce summonses for those workpapers (A-4).

This case obviously presents precisely such an attempt to enforce a summons of the character rejected by the Tenth Circuit in *Coopers & Lybrand* and reflects a continued effort by the IRS to exercise an authority which the court there declined to recognize. It is hard to imagine a controversy more aptly described as "capable of repetition".

This case thus falls squarely within the doctrine, recently affirmed by this Court in *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 377 (1979), that jurisdiction is to be upheld even where the order attacked has expired, if the issue is one "capable of repetition, yet evading review."

In *Gannett,* a publisher had challenged a trial court ruling excluding the press from a pre-trial suppression hearing and from access to the hearing transcript. Even though the petitioner eventually obtained access to the transcript, the appeal was not mooted, this Court held, because the underlying dispute was one "capable of repetition, yet evading review" since the publisher could be subject to closure orders in the future. That, as the court below found, is precisely the case here.

2. Appellate Review Evaded.

The second branch of this Court's test was also easily satisfied here. The First Circuit avoided appellate review of the substantive issue by mooting Andersen's appeal and by declining to pass on it in Good Hope's appeal. The court

thus left the district court holding intact and in conflict with that of the Tenth Circuit in *United States* v. *Coopers & Lybrand.*

It is at this point that the twin anomalies of the opinion below emerge. First, the First Circuit would make the right of appeal one-sided. The Government appealed a result unfavorable to it in *United States* v. *Coopers & Lybrand.* Yet the First Circuit would have accountants take the additional step of incurring contempt in order to present exactly the same issue in a case in which they are aggrieved by the district court's order. This lack of mutuality of recourse makes no sense, and invites review if for no reason other than supervision.

A second anomaly lies in the reasoning of the First Circuit's opinion. In essence, it ruled that the stronger an appellant's interest in a matter, the more likely it is of repetition and less likely to avoid review. This reasoning stands the mootness test on its head. A case should not be found moot because the appellant has a strong interest in pursuing the controversy.

Rather, this Court has considered whether "... 'the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration,' ..." *Gannett & Co.* v. *DePasquale, supra,* 443 U.S. at 377. Here, that criterion is easily satisfied. In typical fashion, the IRS summons issued here called for production within a relatively brief period and the district court order, notwithstanding various requests for a stay, required compliance long before an appeal could be briefed, argued and decided.

The present controversy, therefore, also meets the second test: The issue is one which would "evade review" as that term has developed meaning in the cases. *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976) ("gag order" for duration of criminal trial); *Roe* v. *Wade, supra,* 410 U.S. at 124 (266 day human gestation period in pregnancy related litigation).

The refusal of the court below to apply this doctrine in an appeal from an enforcement order which had been com-

plied with, puts it in direct conflict with the Seventh Circuit on the question. In *Matter of Special April 1977 Grand Jury,* 581 F.2d 589 (7th Cir.), *cert. denied,* 439 U.S. 1046 (1978), the target of a grand jury investigation had moved to quash grand jury subpoenas *duces tecum* served upon members of his staff, calling for the production of certain campaign records and other documents. The subpoenas were modified in part by the district court, but the motion to quash was denied. After a stay of enforcement of the order had been denied by the district court, by the Seventh Circuit, and by this Court, the subpoenas were complied with.

Such compliance with the subpoenas did not moot the appeal, the Seventh Circuit held, because the nature of the action being challenged by appellant was "too short to be litigated fully prior to appellant's compliance." 581 F.2d at 591. To this the court added that it could reasonably be expected that since the subpoenas were part of a continuing investigation, future subpoenas, to which similar objections would be made by appellant or by others, were likely. *Id.* In words strikingly appropriate to the instant controversy, the court observed that a litigant who disputes a lower court order of enforcement should not need to risk contempt in order to obtain appellate review:

> "While it could be argued that appellant could have obtained review before compliance by refusing to supply the documents and appealing a subsequent finding of contempt, the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test. *See, e.g., Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *First National Bank of Boston* v. *Bellotti, supra.*"

Id.

Precisely identical considerations should have led the court below to entertain and decide this appeal on the merits.

3. The Importance of the Issue Precluded a Finding of Mootness in this Case; The Holding Below to the Contrary Raised an Additional Conflict Among the Circuits.

In rejecting this appeal of a concededly important issue, (A 8-9), the court below also placed itself at odds with the decision of the Third Circuit *en banc* in *United States* v. *Frumento,* 552 F.2d 534, 536-41 (3d Cir. 1977). There, a witness who declined to testify in a criminal trial after receiving a grant of immunity was confined pursuant to a finding of civil contempt and he was released from confinement upon its completion. The Third Circuit held that, regardless of whether the case was "capable of repetition" as to the appellant, his appeal was nevertheless not moot because of the significance of the interests at stake. The majority wrote:

> "While in each of the instances discussed, the Supreme Court has determined that 'capability of repetition' existed, we are of the view that such capability was perceived so as to satisfy the true governing consideration behind the Court's decision —that of having review available when significant interests are at stake. We are satisfied that [appellant's] confinement pursuant to an order of contempt, whether or not it is capable of repetition within the exact same framework, must not escape desired review any more than should 'gag orders' where the reason for the 'gag' no longer exists; pregnancies, where the pregnancies have terminated; or strikes, where the dispute has been settled."

Id. at 540.

That this case involves an issue of such significance cannot be doubted. The First Circuit conceded as much in the companion Good Hope appeal:

> "The importance of the interests of all concerned —taxpayers, accountants and IRS—is clear. That a resolution sensitively reflecting the legitimate interests of all and faithful to applicable statutes

> would involve the most delicate and demanding analysis of facts, research of law, and reflection on policy is equally clear. Precisely because we view the issue of 'relevance' as so significant, we find this case [*i.e.*, the second appeal, by Good Hope] in a poor posture to serve as the matrix for a precedent."

A-36.

It is an irony worth noting that the court below managed to find this "significant" issue moot when presented by the auditor but premature when presented by his client. By this remarkable maneuver, the lower court evaded its responsibility to decide this delicate and important issue.

4. The Decision Below Disregards the Mandate of Full Judicial Review of IRS Summonses.

The responsibility to decide the issue presented here is rather more specific than the general duty of courts to decide properly tendered controversies. The duty to review IRS summonses is congressionally mandated. In 26 U.S.C. § 7604 (1976), Congress required application to and a hearing by a federal district court for "full opportunity for judicial review *before any coercive sanctions may be imposed.*" *Reisman* v. *Caplin*, 375 U.S. 440, 449-50 (1964) (emphasis supplied). That supervisory responsibility imposes the serious obligation to scrutinize challenged summonses with care to determine that the production of material called for is within the parameters established by the statute and by the policy considerations implicit in judicial review.[5] As this court observed in *Reisman, supra*, 375 U.S. at 450, court orders enforcing IRS summonses are fully appealable. Indeed, since such a court order of

5. *See, e.g., United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977), *aff'g*, 413 F. Supp. 942 (D. Colo. 1975); *United States* v. *Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *Hubner* v. *Tucker*, 245 F.2d 35 (9th Cir. 1957); *United States* v. *Goldman*, 453 F. Supp. 508 (C.D. Cal. 1978); *United States* v. *Williams*, 337 F. Supp. 1114 (S.D.N.Y. 1971); *United States* v. *Third Northwestern National Bank*, 102 F. Supp. 879 (D. Minn. 1952).

enforcement is a final decision, it is appealable as of right. 28 U.S.C. § 1291 (1976). A holding that a third party (*i.e.*, not the taxpayer-subject of the IRS investigation) must stand in contempt in order to preserve his controversy from mootness effectively frustrates the system of judicial review and appeal established by Congress and recognized in *Reisman*.

5. Strong Policy Reasons Favor Application of the Capable-of Repetition-Yet-Evading-Review Doctrine in These Circumstances.

These highly disturbing implications of the holding below are compounded by the lesson the court below would teach. In ruling that an accountant, having nothing to gain, must stand in contempt merely to preserve a point of law, the court encouraged not only violation of duly entered court orders but disrespect for them and the processes leading to their issuance.

This attempt to close the judicial system, moreover, offers no significant advantages and, in practice, may protract IRS investigations. A rule that production of the papers waives the right to challenge the summons obviously puts a premium on withholding the papers. The rule below thus cuts against the interest it was supposed to serve.

No identifiable interest of tax or judicial administration is served by requiring an auditor to stand in contempt in this way. This case shows that the underlying issue remains fully and adequately presented. Exposing an auditor to jail and fines, with the consequent impact on his reputation, professional standing, employment record and credit rating affords no social or judicial benefit.

The First Circuit seems to suggest that standing in contempt is merely a procedural step, a sort of pleading whose principal consequence is to preserve a question for further litigation. It is much more than that; its real, immediate consequence is to expose the auditor to genuine coercive

sanctions and unacceptable hardships.[6] Both the unseemliness of forcing an auditor to pursue this unlawful course in order to obtain judicial review of what he regards as an ethically required position, and the inordinate consequences he risks by doing so, argue forcefully against adopting so draconian a rule.

II.

CERTIORARI SHOULD BE GRANTED TO ENTERTAIN THE SECOND ISSUE RAISED BY THE PETITION BECAUSE OF ITS IMPORTANCE TO ADMINISTRATION OF THE TAX LAWS AND TO RESOLVE THE CONFLICT AS TO ITS RESOLUTION.

The importance of the underlying issue itself and the conflict between the district court holding which was left in place by the First Circuit and the Tenth Circuit's ruling in *United States* v. *Coopers & Lybrand, supra,* additionally make the second issue raised by the Petition highly appropriate for certiorari.

Indeed, the importance of the issue is conceded by the court below. That concession was provident. The cognate questions of what standards of relevancy are applicable to IRS summonses of third parties and whether such production of tax accrual workpapers should be enforced only upon a showing of need for factual information are highly significant to the relationship of auditors and clients and of great import to administration of the tax laws, and the provision of full disclosure to the users of financial statements.

---

6. The point is not illusory. In 1975, a partner in another national accounting firm, who sought to preserve a very similar question for appeal by the contempt route suggested by the court below, was jailed. *In re Grand Jury Subpoena Duces Tecum, William A. Grant, Jr. and Arthur Young & Co.,* 75 Cr. No. 139 (N.D. Okla. Oct. 6, 1975), Wall St. J., Oct. 8, 1975 at 10, col. 2 (Eastern ed.).

1. The Carte Blanche Discovery of Tax Workpapers by the IRS as Sanctioned Below Sharply Impacts the Ability of Auditors to Perform and Should Not Be Permitted.

To auditors and to the AICPA, the question involves nothing less than the ability to perform effectively the significant audit function of testing a client's reserve for taxes. These reserves are often highly material to the financial statements of publicly and privately held companies. Yet, disclosure of the judgmental materials that comprise tax accrual workpapers, as ordered by the district court in this case, would have a serious impact on the willingness of the client to discuss these matters and the ability of the auditor to function. See, *e.g.*, Testimony of Wilbur Duncan, Transcript of Hearing, at 107-08.

Because of the sensitivity of the opinions, conjectures and speculations—both those received by independent certified public accountants from their clients' personnel and those formulated by the auditors themselves—it was not in the contemplation of the AICPA, when it promulgated its Statements on Auditing Standards, that such materials would be routinely available to the IRS for the asking. Indeed, the AICPA Federal Taxation Division believed, from discussions with the IRS extending over several years, that the IRS understood the importance to the audit process of maintaining the confidentiality of such client information and that a tacit agreement with the IRS existed that access to tax accrual workpapers would not be requested except in extraordinary cases.

The IRS *Handbook for Special Agents* was accordingly amended to provide, in relevant part:

> ". . . The inquiry cannot amount to an inquisition or arbitrary inquiry on the part of the tax investigators. A reasonable basis for making the inquiry must exist. What is justifiable 'fishing' will be determined from all the facts in each case including the end for which the information is sought. *The investigation must not be an unreasonable burden on the third party whose records are sought.*

> In a fraud case, a test as to whether the examination would impose an unreasonable burden is whether the facts show *a reasonable ground of suspicion or probable cause* for the examination to ascertain if there has been a fraud. *The burden upon the third party must be considered in relation to the expected degree of success in finding documents bearing upon the tax liability of the taxpayer being investigated.*" IR Manual, MT 9900-36 §§ 267.2(5) and 267.51(2) (3-1-77) (emphasis added) (footnotes omitted).

And with respect to the workpapers of an independent certified public accountant, the IRS promulgated guidelines requiring that such workpapers be used only as a "collateral source, access to which should be requested with discretion":

> "[E]xaminers will not request access to such workpapers as a matter of standard examining procedure in every case. The access sought should be only to the portion of the workpapers believed to be material and relevant to the examination. In determining materiality and relevance in this context, the examining officer should keep in mind that the taxpayer's records are the primary source of information and the accountant's workpapers should normally be used only as a collateral source, access to which should be requested with discretion. Since audit workpapers are ordinarily the property of the accountant or accounting firm, access normally will be provided by the accountant at his/her office, the office of the taxpayer, or some other suitable location." IR Manual, MT 4000-161 § 4024.2 (6-11-79).[7]

It was on the basis of these statements that then IRS Commissioner Donald C. Alexander assured Congress that the IRS would not issue summonses such as that which it did

---

7. While this guideline does not apply in cases "under joint investigation with the Intelligence Division," *Id.*, § 4024.1(2), the indicated limitations on the circumstances under which the IRS should request workpapers are totally consistent with the general standards noted in the quotation above from the *Handbook for Special Agents*, which does govern the conduct of Intelligence Division cases.

serve on Andersen and now threatens to serve on auditors generally:

> "The Service has long recognized the responsibility which it bears in administering this power. Our procedures regarding the use of the administrative summons clearly reflect this concern. . . .
>
> The discussion [in the Intelligence portion of the *Internal Revenue Manual*] of the use of the administrative summons makes it clear that the first duty of the service representatives is to obtain all information from taxpayers and third parties voluntarily. Several reflective, cautionary paragraphs of our investigative procedures spell out the seriousness attendant upon the issuance and enforcement of a summons, all bearing out the basic message that a summons should be issued only when other avenues of achieving voluntary access have been exhausted, and when the value of the information sought will clearly outweigh the time, expense and legal impact involved."

Testimony of Donald C. Alexander, Commissioner of Internal Revenue, Before the House Subcommittee on Courts, Civil Liberties and Administration of Justice, *BNA Daily Tax Report,* September 9, 1975, at J-9.

In this case, the IRS has ignored its tacit agreement with the AICPA; it has disregarded the tenor of its own general guidelines concerning circumstances under which disclosure of the workpapers of accountants would be sought and has sought to establish a new precedent that tax accrual workpapers will be routinely available to the IRS pursuant to administrative summonses. IR Manual, MT 4000-174 § 4024.3 (6-12-80).

All of this is having its predicted result. As reported recently,

> "Corporate tax directors see a number of alarming possibilities if the IRS continues its hard line. [Allstate Insurance Company tax director] Baudendistal, . . . warns that 'since we'd know that whatever passed

> between us and our accountants could reach the IRS, we would begin to treat the CPAs as we do Internal Revenue. We would give them much less information, and the relationship would weaken.'"

"A Losing Fight to Shield Company Tax Secrets", *Business Week,* 117 (June 16, 1980). Certiorari should be granted to determine whether the law requires this undesirable result.

2. The Second Issue Is the Subject of a Practical Conflict Between the First and Tenth Circuits and Should Be Resolved.

These considerations, coupled with the fact that hard data are to be found, not in the tax accrual workpapers, but in the books and records of the client-taxpayer available to the IRS, led the district and appellate courts in *United States* v. *Coopers & Lybrand, supra,* to define relevance so as to exclude such workpapers from the embrace of 26 U.S.C. § 7602 absent a showing by the IRS of special need. As the Tenth Circuit ruled, these papers offer the IRS merely a convenience in analyzing the corporate taxpayer's books and records. 550 F.2d at 621. The "IRS does not, as it appears to assume on this appeal, have *carte blanche* discovery." *Id.* at 619.

In so ruling, the Tenth Circuit adopted and applied to tax accrual workpapers the analysis of the Eighth Circuit in *United States* v. *Matras,* 487 F.2d 1271 (8th Cir. 1973) and the Fourth Circuit in *United States* v. *Theodore,* 479 F.2d 749 (4th Cir. 1973). In *Matras,* the Eighth Circuit ruled that, "The term 'relevant' connotes and encompasses more than 'convenience.'" 487 F.2d at 1275. In *Theodore,* the Fourth Circuit similarly affirmed with respect to summonses of third parties:

> "A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought. . . . [W]here it appears that the purpose of the summons is a 'rambling exploration'

> of a third party's files, it will not be enforced. . . . Indeed, we agree with Judge Lumbard that '[t]his judicial protection against the sweeping or irrelevant order is *particularly* appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealing with the person under investigation.'" 479 F.2d at 754 (citations omitted).

That the burdens on the auditing process should require a showing of special need consisting of inability to obtain otherwise the factual information sought before disclosure of tax accrual workpapers will be ordered is clear enough, has its analogue in civil discovery cases,[8] and, until this case, had remained uniformly decided.[9] Clarification, however, is now needed because of the *carte blanche* approach of the district court below in ordering production of tax accrual workpapers at the behest of an IRS agent who argued only that they might be convenient. Certiorari should be granted to resolve the conflict and settle this highly important issue.

---

8. *See, e.g., Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965) (discovery of confidential business information); *Carlson Companies, Inc.* v. *Sperry and Hutchinson Co.*, 374 F. Supp. 1080, 1088 (D. Minn. 1974) (" . . . when [discovery] requests approach the outer bounds of relevance . . . the Court must then weigh [the] request with the hardship to the party from whom the discovery is sought.").

Considerations such as these have prompted the recognition of relational privileges between lawyer and client, physician and patient, and clergy and penitent. The AICPA fully recognizes that federal law at present recognizes no such privilege for the auditor-client relationship and the considerations proposed in the text are not advanced for the purpose of procuring treatment tantamount to such a privilege. Rather, it is the position of the AICPA that such policy considerations must be taken into account in determining whether the showing made by the IRS for production of the auditor's papers in a particular case satisfies the standard of relevancy.

9. The issue was expressly reserved by the Second Circuit in *United States* v. *Noall*, 587 F.2d 123, 127 n.5 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). There the court held only that an IRS summons could reach reports by *internal* corporate auditors. The case did not involve the impact on the ability of independent auditors to function.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KENNETH J. BIALKIN
LOUIS A. CRACO
HOWARD C. BUSCHMAN III

Attorneys for American Institute of Certified Public Accountants
One Citicorp Center
153 East 53rd Street
New York, New York 10022

Of Counsel

WILLKIE FARR & GALLAGHER
One Citicorp Center
153 East 53rd Street
New York, New York 10022